SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

LOCAL No. 6167, UNITED MINE WORKERS OF AMERICA, AN UNINCORPORATED ASSOCIATION, AFFILIATED WITH THE INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL., PETITIONERS,

vs.

JEWELL RIDGE COAL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

Civil Action No. 73

JEWELL RIDGE COAL CORPORATION, Plaintiff

v.

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, et al., Defendants

STIPULATION OF COUNSEL AS TO CONTENTS OF RECORD—Filed April 12, 1944

It is hereby stipulated and agreed between counsel for the parties to the above entitled proceeding that the record on appeal consist- of the following:

(1) Complaint of plaintiff.
(2) Answer of defendants, including counter-claim of employee defendants.
(3) Amendment to answer and counter-claim.
(4) Plaintiff's answer to counter-claim.
(5) Order of October 30, 1943.
(6) Pre-trial order of November 5, 1943.
(7) Order of November 24, 1943.
(8) Transcript of evidence and exhibits, including the map filed by the plaintiff.
(9) Defendants' request for findings of fact.
(10) Opinion of the Court, embracing findings of fact and conclusions of law, dated Jan. 25, 1944.
(11) Judgment and order of January 25, 1944.
(12) Notice of Appeal, with date of filing.
(13) This stipulation.

(S.) George Richardson, Jr., of Counsel for the Plaintiff. Frank W. Rogers, of Counsel for the Defendants.

[File endorsement omitted.]

[fol. 2] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

Civil Action No. 73

JEWEL RIDGE COAL CORPORATION, a Corporation, Plaintiff,

v.

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, an unincorporated association, affiliated with the International Union, United Mine Workers of America; Harlan Hampton, President; John A. White, Vice President; Omer Ketron, Recording Secretary; James W. Belcher, Financial Secretary; C. M. Mathena, Treasurer; Tony Farnese, Door Keeper; Individually and as Officers of said Local No. 6167;

CARL ALTIZER, OMER KERTON and T. V. WHITE, Individually and as Members of the Mine Committee of said Local No. 6167; H. D. Hampton, Tony Farnese, and James Al Smith, Individually and as Members of the Safety Committee of said Local No. 6167;

LOCAL NO. 7337, UNITED MINE WORKERS OF AMERICA, an unincorporated association affiliated with the International Union, United Mine Workers of America; J. H. Sheppard, President; J. E. Collins, Vice President; Forrest Ritchie, Recording Secretary; Josh Keen, Financial Secretary; C. F. Clark, Treasurer; Lyss Patrick, Door Keeper; Individually and as Officers of said Local No. 7337;

JOSH KEEN, J. A. WHITE and PAUL SYKES, Individually and as Members of the Mine Committee of said Local No. 7337; Walter Jackson, J. S. Walker and Glenn Crouse, Individually and as Members of the Safety Committee of said Local No. 7337;

DISTRICT NO. 28, UNITED MINE WORKERS OF AMERICA, an unincorporated association, affiliated with the International Union, United Mine Workers of America; John Saxton, President, and W. F. Minton, Secretary-Treasurer, individually and as Officers of said District No. 28, and

[fol. 3] INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, an unincorporated association and JOHN L. LEWIS, individually and as President of said International Union, Defendants.

COMPLAINT—Filed July 30, 1943

I

Allegations of Jurisdiction

1

Plaintiff is a corporation organized under the laws of Virginia, having its principal office in Tazewell County in the Western District of Virginia.

Defendant, Local No. 6167, United Mine Workers of America, is an unincorporated association, located and doing business in the Western District of Virginia.

Defendants Harlan Hampton, John A. White, Omer Kerron, James W. Belcher, C. M. Mathena, Tony Farnese, Carl Altizer, T. V. White, H. D. Hampton, and James Al Smith are officers and committeemen of Local No. 6167, United Mine Workers of America, as listed in the caption hereto, and are citizens and residents of the Western District of Virginia.

Defendant, Local No. 7337, United Mine Workers of America, is an unincorporated association, located and doing business in the Western District of Virginia.

Defendants J. H. Sheppard, J. E. Collins, Forrest Ritchie, Josh Keen, C. F. Clark, Lyss Patrick, J. A. White, Walter Jackson, Glenn Crouse, Paul Sykes and J. S. Walker are officers and committeemen of Local No. 7337, United Mine Workers of America, as listed in the caption hereto, and are citizens and residents of the Western District of Virginia.

Defendant District No. 28, United Mine Workers of America, is an unincorporated association, affiliated with the International Union, United Mine Workers of America, located and doing business in the Western District of Virginia.

Defendants John Saxton and W. F. Minton are officers of said District 28, as listed in the caption hereto, and are citizens and residents of the Western District of Virginia.

Defendant International Union, United Mine Workers of America, is an unincorporated association, doing business in the Western District of Virginia.

Defendant John L. Lewis is President of said International Union and is a citizen and resident of the Eastern District of Virginia.

2

The matters in controversy exclusive of interest and costs, exceed the sum of Three Thousand Dollars ($3,000.00).

3

The action asires under a certain law of the United States, to wit: The Act of June 25, 1938, cited as The Fair Labor [fol. 4] Standards Act of 1938 (52 Statutes at Large 1060-9, 29 U. S. C. 201-219), hereinafter referred to as the Act, and is for a judgment declaring the rights and legal relations of the parties, together with such injunctive relief as may be proper under the provisions of the Federal Declaratory Judgment Act, Title 28, U. S. C. A. 400, the Judicial Code, Section 274(d).

The action is also to secure such other, further and general relief as may be proper in the premises.

II

Plaintiff's Mining Operations

1

Plaintiff owns and operates in Tazewell County and Buchanan County, Virginia, two mines for mining and preparing bituminous coal for sale. Approximately 500 workers at plaintiff's Jewell Ridge Mine in Tazewell County, and approximately 400 workers at its Jewell Valley Mine, in Buchanan County, are employed in duties required to be performed underground. There are approximately 70 outside employees at the Jewell Ridge Mine and approximately 40 outside employees at the Jewell Valley Mine. Coal extracted from said mines is prepared by the plaintiff at or near the mines and is sold and shipped into various states of the United States. The seam or vein of coal worked in said mines varies in thickness from approximately 36 minches to approximately 48 inches. The coal is mined by being cut mechanically, shot down with ex-

plosives, loaded by workmen into mine cars, and drawn by electrically operated motors from the working places in the mine where the cars are loaded to the tipple where it is received, prepared and loaded into railroad cars.

2

The seam of coal worked and operated by plaintiff in its said mines is at an elevation above that of the railroad tracks serving said mines and the mining operations in said seams are carried on through what is known as a drift mouth, or portal, through which tracks laid horizontally and approximately level extend back underground to the working "face" where the coal is actually mined.

3

The underground workers when going to work in plaintiff's said mines enter the mines and proceed to their working places either on foot and at such times as may suit their convenience, or, at their option, by means of man trips operated by plaintiff for the purpose of taking the workers to their respective working places in the mines. Such man trips are motor drawn trains of mine cars for the transportation of workers only which leave the drift mouth, or portal, of the mine at stated times, according to the section of the mine to which the particular man trip is proceeding. The point of beginning the man trips is fixed by the plaintiff at a place conveniently accessible to its underground workers, so as to serve their convenience rather than to minimize the travel time from portal to working place. Those workers who enter other than by the man trips do so through various openings at their own election.

[fol. 5]

4

No underground worker does for the plaintiff any of the work he is employed to do or is on call or subject to direction in the performance of his duties in the employment of plaintiff until he arrives at his usual working place, wherever that may be.

5

At the conclusion of their day's work, which, as hereinafter shown, means seven hours work in the mines at the usual working places for all classes of labor, exclusive of

the lunch period, whether they be paid by the day or be paid on the tonnage basis, plaintiff's underground workers return to the outside afoot, by such way as they wish to go, or, at their option, on a man trip provided by plaintiff for their return to the portal.

6

Computing the entire time elapsed from the entrance of the several man trips into the portal of the mine until their return at the end of the working day, the workers employed in plaintiff's Jewell Ridge Mine consume on an average for each man approximately 88 minutes each working day in traveling from the mine portal to the usual working places and thence back to the mine portal, and, in like manner, the workers employed in plaintiff's Jewell Valley Mine consume on the average for each man approximately 67 minutes. The exact time consumed by the several workers in traveling to and from their working places varies among the sections and the individual workers.

7

Plaintiff formerly operated its mines two shifts each day not exceeding five days a week. But in compliance with the Executive Order of the President of the United States, issued February 9, 1943, in respect to the effective utilization of manpower and Memorandum of Agreement between the United Mine Workers of America and Southern Coal Producers Association made February 10, 1943, plaintiff has operated its said mines two shifts of seven hours each day for six days in each workweek.

III

Wage Agreements

1

At all times, since the effective date of the Act, namely, October 24, 1938, and for a number of years prior thereto, plaintiff has operated its said mines under wage agreements negotiated with its mine workers through defendants' Local No. 6167 and Local No. 7337 and District No. 28, and the International Union, United Mine Workers of America, as the representatives of plaintiff's employees

for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. The latest agreement so made between the plaintiff and its said mine workers is the Southern Wage Agreement together with the Smokeless Wage Agreement and local Agreement made pursuant thereto, all effective April 1, 1941, until March 31, 1943, subsequently by agreement of the parties extended through the 30th day of April, [fol. 6] 1943, and thereafter with such modifications as were contained in the directive order of June 18, 1943, further extended by the National War Labor Board. The said Wage Agreements prescribe conditions of employment and rates of pay applicable to all of plaintiff's mine workers. The provisions of said agreements as to maximum hours, working time and overtime are for convenience here set out, to wit:

"Maximum Hours and Working Time

"Seven hours of labor shall constitute a day's work. The seven-hour day means seven hours' work in the mines at the unual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis; except in cases of accident which temporarily necessitates longer hours for those Mine Workers required on account thereof; and also excepting that number of Mine Workers in each mine whose daily work includes the handling of man-trips and those who are required to remain on duty while men are entering and leaving the mine.

"Overtime

"Work by Mine Workers paid by hour or day in excess of seven (7) hours in one day or thirty-five (35) hours in any one week shall be paid for at the rate of time and one-half with the following exceptions:

"Mine Workers engaged at power houses, substations, and pumps operating continuously for twenty-four (24) hours daily are especially exempted from the seven (7) hour day and the time and one-half provisions. Special exemptions for individual Mine Workers other than those named above when twenty-four (24) hours continuous operation daily is required are subject to arrangement between mine management and

district officers without time and one-half for overtime. Mine Workers so especially exempted are limited to eight (8) hours per day and forty (40) hours per week and time and one-half for time worked in excess thereof.

"The seven (7) hour day, five (5) day week (35 hours per week) as provided in this Agreement shall prevail.

"The following classes of Mine Workers are exempted from the foregoing provisions as to maximum hours of work.

"All Mine Workers engaged in the transportation of men and coal shall work the additional time necessary to handle man-trips and all coal in transit and shall be paid the regular hourly rate for the first seven (7) hours and time and one-half for all overtime.

"Outside Mine Workers engaged in the dumping, handling and preparation of coal, and the manufacture of coke, shall work the additional time necessary, not to exceed thirty (30) minutes, to dump and prepare the coal delivered to the tipple each shift, and complete the usual duties incidental to the operation of coke ovens, and shall be paid the regular hourly rates for the first seven (7) hours and time and one-half for overtime not to exceed the thirty (30) minutes hereinbefore stated.

[fol. 7] "When day men go into the mine in the morning they shall be entitled to two hours' pay whether or not the mine works the full two hours, but after the first two hours the men shall be paid for every hour thereafter by the hour, for each hour's work or fractional part thereof. If for any reason the regular routine work cannot be furnished inside day men, the employer may furnish other than the regular work.

"Drivers shall take their mules to and from stables, and the time required in so doing shall not include any part of the day's labor, their work beginning when they reach the change at which they receive empty cars, but in no case shall the driver's time be docked while he is waiting for such cars at the point named. The method at present existing covering the harnessing and unharnessing of mules shall be continued throughout the life of this Agreement.

"Motormen and trip riders shall be at the passway where they receive the cars at starting time. The time

required to take motors to the passway at starting time and departing from the same at quitting time shall not be regarded as a part of the day's labor, their time beginning when they reach the change or parting at which they receive cars, but in no case shall their time be docked while waiting for cars at the point named. Motormen shall at all times take proper care of the motors and the customs prevailing at each mine relative to greasing and oiling the motors and filling sand boxes and reporting on the conditions of the motors shall continue during the life of this Agreement."

2

Under date of February 10, 1943, a certain supplemental Memorandum of Agreement was made by and between said International Union, of the one part, and Southern Coal Producers Association and others, of the other part, representing the same parties as those in the above-mentioned agreements of 1941. The provisions of said supplemental Memorandum of Agreement are, for convenience, here set out, to wit:

It is agreed that the current Joint Agreement, known as the Southern Wage Agreement, and District Agreements subsidiary thereto, between the United Mine Workers of America and the before-named Associations, is amended and modified as follows:

(A) The basic work week of thirty-five hours per individual employed shall be agreed as beginning on Monday of each week.

(B) The six day workweek is authorized, provided that all individual mine workers working in excess of thirty-five hours in any one week, beginning on Monday of each week, shall be paid time and one-half or rate and one-half for such work as the case may be. This arrangement shall cover day and monthly men, tonnage, yardage and deadwork rates.

[fol. 8] (C) Holidays may be worked, provided the coal company, the District Organization and the membership of the Local Union agree upon such holiday work. Time and one-half and rate and one-half shall be paid for holiday work.

Such payment for holiday work shall not interfere with the payment of time and one-half and rate and

one-half for work done on the following Saturday in the same week.

(D) No mine worker shall be fined or penalized for absenteeism affecting Saturday or holiday work.

This supplemental agreement, negotiated between the contracting parties signatory hereto, shall be in effect until the date of expiration of the basic Southern Wage Agreement, namely Midnight, March 31, 1943.

3

The aforesaid Wage Agreements of 1941 were next preceded by the Appalachian and Pocahontas-Tug River Agreements made May 12, 1939, effective from that date until March 31, 1941, and said agreements were in turn next preceded by the Appalachian Agreement made April 2, 1937, and the Smokeless Wage Agreement made pursuant thereto, effective April 1, 1937, for the period expiring April 1, 1939, all obligatory upon the plaintiff and the defendants. The said agreements of 1937 and 1939 contained the same provisions hereinabove quoted from said agreements of 1941.

4

All of the aforesaid agreements were negotiated and made on behalf of the plaintiff's said employees and others by the International, District and Local officers of the United Mine Workers of America, which is a powerful and independent Union, having a membership, as plaintiff is informed, of more than 500,000 mine workers, and a record through more than fifty years of effective and generally constructive work in their behalf, constituting one of the most notable achievement records in the annals of American Trade Unions.

5

Plaintiff is informed and believes, and upon such information and belief says, that in the spring of 1940 an inspector, acting for Colonel Philip D. Fleming, then Wage and Hour Administrator under said Act, made an extended investigation into the wage and hour practices of certain coal mining companies in Pennsylvania and out of such investigation raised a question as to whether, under the provisions of Section 7 or said Act, the travel time consumed by employees of such companies in going to and from

their usual working places was to be included in the work-week and paid for notwithstanding the long established practice to the contrary universally followed in the industry, and notwithstanding the explicit provisions of said Wage Agreements then in effect; that representatives of the United Mine Workers and of various operators, parties to the then current Wage Agreement, met and discussed among themselves and with the said Wage and Hour Administrator the questions so raised by such investigation and by the proceeding and decree in the case of *Fleming, Administrator*, etc., v. *Cornucopia Gold Mines* (unreported) in relation to the provisions of the current Appalachian [fol. 9] Wage Agreement and the practices in respect to computing and paying for working time, universally and consistently followed in the bituminous coal mining industry for more than fifty years; that pursuant to such consideration of said problems, Earl E. Houck, Esquire, Director of the Legal Department for the United Mine Workers of America, in collaboration with W. L. Robison, Charles O'Neill, L. T. Putnam, L. C. Gunter and J. D. A. Morrow, addressed under date July 9, 1940, to Colonel Philip D. Fleming, Administrator, Wage and Hour Division, Department of Labor, Washington, D. C., a letter showing in detail the practices followed in the bituminous coal mining industry in computing and paying for working time of underground employees, the reasons for such practices, the difficulties, inequities and hardships which would result from a departure from those practices carefully worked out through the years and reflecting the experience of long continued collective bargaining, the fortunate position to which mine workers had attained under their collective bargaining whereby the benefits conferred on them as to wages and hours by said Agreements far exceeded those provided by the Act, and the total absence of any occasion, in respect to objectives of the Act, for imposing upon the industry any requirements in relation to computing and paying for the working time of underground employees beyond those provided in said Agreements; that in reply under date July 18, 1940, the Honorable Philip D. Fleming, as such Administrator, *expressly* ruled that the practice of computing working time for underground employees as theretofore followed in the bituminous coal mining industry and as provided in said Agreements was not unreasonable, thereby ratifying and approving the pro-

visions of and practices under said Agreements as being in consonance with the objects and provisions of said Act. Neither the said Administrator nor his successor in office, as far as this plaintiff is informed, has at any time changed the aforesaid ruling or done any act inconsistent with his said approval of the system worked out by collective bargaining and uniformly followed in the bituminous coal mining industry of computing the workweek for underground workers and paying them upon the basis of hours worked at their usual working places, exclusive of travel time.

6

In reliance upon the aforesaid approval by the Wage and Hour Administrator, this plaintiff and its employees continued to operate on the basis provided as aforesaid in the said Wage Agreement of March 12, 1939; and upon the expiration of that agreement in the spring of 1941 this plaintiff, through its accredited representatives, and its said employees through the International, District and Local officers of United Mine Workers of America, negotiated and made the said agreement of July 5, 1941, and under the terms and provisions of the same plaintiff continued to compute the working time for all of its underground workers, as in said agreement provided, upon the basis of hours spent at the usual working places, exclusive of travel time, and on that basis made all payroll calculations and payments which have been, with full knowledge of all the aforesaid facts, accepted in full settlement and satisfaction of plaintiff's entire obligation to its said employees for their services.

7

The wages paid by plaintiff to its underground workers as provided in the aforesaid Wage Agreements, and the amounts now being paid to them, have at all times been and are greatly in excess of the minimum wages required to be paid under provisions of the Act; the maximum hours of work in the regular work-week are less than the maximum hours provided in said Act; and for all time worked in excess of the regular workweek as defined in said Wage [fol. 10] Agreement plaintiff has paid to all of its underground workers one and one-half times the regular rate provided in said Wage Agreement.

8

As far as this plaintiff is informed, none of the defendants, nor anyone for them at any time prior to March, 1943, asserted any claims under the Act, or otherwise, for payment for any of the time consumed in traveling from the mine portal to the usual working place and return to the portal. But in March 1943 representatives of Operators throughout the Appalachian area and the United Mine Workers of America assembled at New York to negotiate a new Wage Agreement, and the defendant, John L. Lewis thereupon announced the demands of the mine workers, which included a general wage increase of Two Dollars ($2.00) a day. Thereafter on March 16, 1943, the Circuit Court of Appeals, Fifth Circuit, announced its decision in the case of *Tennessee Coal, Iron & Railroad Company v. Muscoda Local No. 123*, et al., 135 F. 2d. 320, and then for the first time the defendants advanced the claim that the Act requires such travel time to be counted as hours worked.

IV

The Defendants

1

All of the hereinbefore named officers of Defendant Local No. 6167 and Local No. 7337 are employees of the plaintiff, and are respectively representative of all plaintiff's employees, at its Jewell Ridge and Jewell Valley Mines respectively. Said employees are so numerous as to make it impracticable to bring them all before the court, and said named defendants are, therefore, made parties defendant hereto individually and in their respective representative capacities as provided in Rule 23(a) of the Federal Rules of Civil Procedure, so as fairly to insure the adequate representation of all plaintiff's said employees in respect to the rights herein sought to be declared and enforced for or against them as a class.

2

Said defendants Local No. 6167, Local No. 7337, District 28, and International Union are unincorporated associations within the meaning of Section 6058 of the Code of Virginia, and as such are suable by service upon their respective presidents pursuant to Rule 17(b) of the Federal

Rules of Civil Procedure. Said Section 6058 reads as follows, to wit:

> All unincorporated associations or orders may sue and be sued under the name by which they are commonly known and called, or under which they do business, and judgments and executions against any such association or order shall bind its real and personal property in like manner as if it were incorporated. Process against such association or order may be served on any officer or trustee of such association or order.

[fol. 11]

3

The plaintiff invites the timely intervention in this action of any of its other employees or any other person represented by the International Union, United Mine Workers of America, who are not specifically or individually made defendants hereto, to intervene or join herein as parties defendant to the end that the controversy herein set forth may be fully and fairly determined by this court in this proceeding.

4

The Administrator of the Wage and Hour Division, United States Department of Labor, as such Administrator, is interested in the construction and application of the Act and plaintiff invites the timely intervention of such Administrator in this action.

V

Statement of Controversy

1

An actual controversy exists between the plaintiff, on the one hand, and the defendants herein named, on the other hand, said controversy growing out of the facts hereinabove stated and the construction of Section 7 of the Act in relation to the practices of the parties hereto, as hereinbefore stated.

2

The plaintiff asserts that:

(a) In computing the workweek of its underground employees on the basis of the time worked in the mines at the

usual working places for all classes of labor, as provided in the aforesaid Wage Agreements, paying said workers accordingly, including one and one-half times the regular rate for all hours employed over thirty-five (35) computed as aforesaid in any workweek, it has fully complied with and satisfied the pertinent requirements of the Act;

(b) No part of the travel time of its underground employees from the portal to the usual working place and return, is a part of the workweek of plaintiff's said employees within the provisions of said Act;

(c) Neither travel time nor any other time spent by plaintiff's underground employees except that at their usual working places in the mines for all classes of labor, exclusive of the lunch period, is within the agreement or any obligation in law on the part, of the plaintiff to pay for as for hours employed or a part of the employee's workweek; and that

(d) It was not the intention of the Congress in enacting its Act to change the definition of working time and practices long established in the coal mining industry with respect to the status of travel time.

[fol. 12] The defendants (2), and each of them, on their part assert that:

(a) The term "workweek" as contained in Section 7 of the Act of 1938, when properly construed, includes all time elapsing from the mine worker's entering the portal of the time at the commencement of his day's work, until his emerging from the same at the close of the day's work, excepting the period provided for lunch, or, as otherwise stated, the entire time from "portal to portal", excepting only the lunch period;

(b) Computation of the workweek and wages due therefor under the provisions of said Act entitle the workers as a matter of legal right to the full amount so determined;

(c) Notwithstanding the plaintiff's having paid all of its underground workers the full amount due them for all work done by them computed according to the provisions of the applicable Wage Agreements, still the plaintiff's underground employees are entitled to have and recover

from the plaintiff the additional amounts found to be owing as the result of including in their respective workweeks all time spent from "portal to portal", less the lunch period.

VI

Demand for Judgment

Wherefore, plaintiff prays this course to make and enter a judgment declaring the rights of the parties hereto in the premises and, more particularly, plaintiff's rights as asserted in the following specific propositions:

(a) Plaintiff, in computing the work week of its underground employees on the basis of hours of work in the mines at the usual working places, exclusive of the lunch period and travel time, as provided in the effective Wage Agreements, and in paying its underground workers for their services on that basis, has complied with and discharged the obligations imposed upon it by Section 7 of the Act.

(b) Section 7 of the Act does not require that there be included within the workweek of underground workers in plaintiff's mines time spent in travel from the portal, to their usual working places and return.

(c) The Congress, in the enactment of Section 7 of the Act, did not intend that the workweek of plaintiff's underground employees should include any portion of such travel time.

(d) There is nothing in the Act, nor in the hearings and debates that preceded its passage, to indicate any intention, and the Congress in enacting the Act did not intend to change the well known definition of working time or workweek long established by wage agreements resulting from collective bargaining in its fullest sense and practices uniformly followed throughout the coal mining industry.

[fol. 13] And plaintiff further prays that said defendants, their agents, representatives and all underground employees of the plaintiff made parties hereto as a class, be restrained and enjoined from prosecuting any suit, action or claim of any nature whatsoever against plaintiff for any additional wages or compensation claimed to be due them under the provisions of the Act, pending final judg-

ment in this action; and plaintiff prays for a general declaratory judgment with reference to the questions presented by this petitioner and a judgment against the defendants herein for the cost of this proceeding, and for such other, different, further, or general relief as to the court may seem just and proper in the premises.

(S.) William A. Stuart, Abingdon, Virginia; George Richardson, Jr., 506 Commercial Bank Building, Bluefield, West Virginia, Attorneys for Plaintiff.

Of Counsel: Penn, Stuart & Phillips, Abingdon, Virginia; Richardson & Kemper, Bluefield, West Virginia.

[fol. 14] *Duly sworn to by Huston St. Clair. Jurat omitted in printing.*

[File endorsement omitted.]

[File endorsement omitted]

[fol. 15] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME—August 23, 1943

This day came the defendants, by Frank W. Rogers and Leonard G. Muse, Esquires, of counsel, and represented to the Court that according to their information some of the defendants were not served with process until August 17th, that all of the defendants desired to unite in one answer, and that the collection of factual data necessary for the purposes of the answer would require some time. They therefore moved the Court to extend the time for the filing of answers by all defendants until September 15th, 1943.

Appropriate notice of the motion having been given counsel for the plaintiff, and they having made no objection thereto, and the Court being of the opinion that the motion is proper and should be granted, it is so ordered.

(S.) A. D. Barksdale, U. S. District Judge.

[File endorsement omitted]

[fol. 16] IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF ALL DEFENDANTS—Filed September 8, 1943

Now come all of the defendants in the above entitled cause and make answer to the Complaint heretofore filed against them as follows:

1

Defendants admit that plaintiff is a corporation organized under the laws of Virginia, having its principal office in Tazewell County in the Western District of Virginia.

The jurisdictional allegations with reference to Local No. 6167, United Mine Workers of America, contained in the second paragraph of Paragraph 1 of the "Allegations of Jurisdiction" are not entirely accurate. Local No. 6167 is an unincorporated voluntary association and labor union located and functioning as such in the Western District of Virginia.

Defendants admit that Harlan Hampton, John A. White, Omer Ketron, James W. Belcher, C. M. Mathena, Tony Farnese, Carl Altizer, T. V. White, H. D. Hampton, and James Al Smith are officers and committeemen of Local No. 6167, United Mine Workers of America, and are citizens and residents of the Western District of Virginia.

[fol. 17] The allegations as to defendant Local No. 7327, United Mine Workers of America, contained in the fourth paragraph of Paragraph 1 of the "Allegations of Jurisdiction" are not entirely accurate. Local No. 7327 is an unincorporated voluntary association and labor union located and functioning as such in the Western District of Virginia.

Defendants admit that J. H. Sheppard, J. E. Collins, Forrest Ritchie, Josh Keen, C. F. Clark, Lyss Patrick, J. A. White, Walter Jackson, Glenn Crouse, Paul Sykes and J. S. Walker, are officers and committeemen of Local No. 7327, United Mine Workers of America, and are citizens and residents of the Western District of Virginia.

The allegations with reference to defendant District No. 28, United Mine Workers of America, contained in the sixth paragraph of Paragraph 1 of the "Allegations of

Jurisdiction" are not entirely accurate. District No. 28 is an unincorporated voluntary association and labor union located and functioning as such in the Western District of Virginia.

Defendants admit that John Saxton and W. F. Minton are officers of District No. 28, United Mine Workers of America, and are citizens and residents of the Western District of Virginia.

The allegations with reference to defendant International Union, United Mine Workers of America, contained in the eighth paragraph of Paragraph 1 of the "Allegation of Jurisdiction" are not entirely accurate. The defendant International Union, United Mine Workers of America, is an unincorporated voluntary association and labor union with subordinate branches located and functioning as such in the Western District of Virginia.

[fol. 18] The allegations with reference to the defendant John L. Lewis contained in the ninth paragraph of Paragraph 1 of the "Allegations of Jurisdiction" are not entirely accurate. Mr. John L. Lewis is President of the International Union, United Mine Workers of America. He maintains a residence in the Eastern District of Virginia, but this defendant votes in and is a citizen of the State of Illinois.

2

The averments of Paragraph 2 of the "Allegations of Jurisdiction" are admitted.

3

The defendants admit the averments of Paragraph 3 of the "Allegations of Jurisdiction."

4

The defendants admit the averments of Paragraph 1 of Division II of the Complaint, entitled "Plaintiff's Mining Operations."

5

The defendants admit the averments of Paragraph 2 of Division II of the Complaint, entitled "Plaintiff's Mining Operations."

6

The plaintiff has not stated with complete accuracy the pertinent facts of operation of its mine in Paragraph 3 of

Division II of the Complaint, entitled "Plaintiff's Mining Operations."

The plaintiff operates two mines, one known as Jewell Ridge and the other known as Jewell Valley.

A—Jewell Ridge

The great majority of the employees are required to assemble at or near this mine before 7 o'clock in the morning. The men spend several minutes getting their lamps at the Company's lamp house. A man presents his lamp check to the lamp house man and receives a lamp, which is an [fol. 19] electric battery lamp and weighs 5¾ pounds. The battery fits on the employee's belt and the cable goes up his back and over the top of his cap to the lamp.

By 7 o'clock the men are required to be aboard the company cars that haul them into the mine. These cars are ordinary mine cars used for hauling coal and are always dirty with coal dust, often wet and slick and in the winter sometimes covered with snow. No seats are provided in the car and the men must crouch in them and remain in a crouched position as the man trip travels under ground or else run the risk of having their heads injured by contact with the roof of the mine.

The Company foreman is present and in charge of loading the men into the cars which make up a man trip. He rides the trip and has full charge of the trip and men.

The man trip at this mine picks up the men near the lamp house, which is about 300 feet from the mouth of the mine. The cars are hauled into the mine by electric motors. The speed with which the man trips travel varies at different times and sometimes runs about 20 miles per hour, although Company Rule 33 directs "The man trip shall not exceed six miles per hour." The man trips haul the men to and from various parts of the mine and these men must walk variable distances.

The employees are under the control, direction or supervision of the plaintiff from the time they assemble until the time they leave the mine for their homes at the end of the shift.

On the regular shift at this mine the men are in the mine approximately 9½ hours. All of that time they are subject to inconvenience and exposed to the various hazards surrounding the mining of coal.

[fol. 20] A portion of the men are not required to board the man trips at the place where the man trips begin. These men enter at different places, through old openings, and are required to meet and board the man trip on its regular schedule. They check in with the foreman and must receive their battery lamps from him. They may walk into the mine with a carbide lamp but are forbidden to work with such a light. Approximately 50 men enter and walk to and from their regular working places. They too must check in and receive their battery lamps from the foreman.

B—Jewell Valley

At Jewell Valley there is only one place where the men are permitted to catch a man trip. All employees enter through the man portal and are required to report and do report to the lamp house, get their lamps and are required to ride a man trip. The men report to the lamp house about 7 o'clock in the morning and present their checks to the lamp house man to get their lamps. At this mine the man trip leaves at 7:20 or 7:22. Here, as at Jewell Ridge, the foreman loads the men into cars, telling them when to get into the man trip and taking full charge of it. One of his duties is to keep the men out of the tool car, usually the first car in the trip, and which he must designate as such under the rules of the company.

At neither mine do man trips always proceed without interruption. They are frequently delayed by various causes.

7

The defendants deny the averments of Paragraph 4 of Division II of the Complaint, entitled "Plaintiff's Mining Operations." Defendants aver that exactly the contrary is true. The men are required to be on hand at a specified time. They are subject to the control, direction or supervision of the plaintiff and are at work within the meaning and effect of the Fair Labor Standards Act from the time they are reuired to assemble at the beginning of the shift until time they disperse at the end of the shift, excepting [fol. 21] the prescribed lunch period. Those men who walk to and from their places of work are likewise at work within the meaning of the Fair Labor Standards Act during all the time, excepting the lunch period, they are in the mines.

8

Defendants deny the averments of Paragraph 5 of Division II of the Complaint, entitled "Plaintiff's Mining Operations" and for a more accurate statement respectfully refer the Court to the specific allegations set up hereinabove in Paragraphs 6 and 7. With a few insignificant exceptions the exit from the mines is a reverse process of the entry.

9

Answering Paragraph 6 of Division II of the Complaint, entitled "Plaintiff's Mining Operations" the defendants admit that the travel time is at least as great as the figures given in this paragraph. Defendants charge upon information and belief that the travel time is somewhat in excess of the figures given by the plaintiff.

10

Answering Paragraph 7 of Division II of the Complaint, entitled "Plaintiff's Mining Operations," defendants say that the shifts which plaintiff operated were not seven hour shifts but were as a matter of fact and as a matter of law approximately nine hour shifts in the Jewell Ridge mine and approximately 8⅓ hour shifts in the Jewell Valley mine. Incidentally, the Agreement of February 9, 1943, was between the United Mine Workers of America and this particular plaintiff.

11

Answering Paragraph 1 of Division III of the Complaint, entitled "Wage Agreements," these defendants deny that plaintiff has operated its mine under wage agreements as therein alleged "at all times" since the effective date of the Act and say that the last wage agreement between [fol. 22] plaintiff and the United Mine Workers of America expired on midnight March 31, 1943. Defendants admit that the wage agreement contained the provisions "maximum hours and working time" and "overtime" as set out in this paragraph of the Complaint, the legal effect of which, however, is to be determined by the court under the facts.

12

Subject to the materiality and admissibility thereof, defendants admit the execution of the Supplemental Memo-

randum of Agreement referred to in Paragraph 2 of Division III of the Complaint, entitled "Wage Agreements," the legal effect of which, however, is to be determined by the court under the facts.

13

Answering Paragraph 3 of Division III of Plaintiff's Complaint, entitled "Wage Agreements," the defendants subject to the materiality and admissibility thereof, admit the execution of the contracts named, the legal effect of which is to be determined by the court under the facts.

14

Answering Paragraph 4 of Division III of the Complaint, entitled "Wage Agreements" the defendants admit that the United Mine Workers of America have a membership of more than 500,000 mine workers and that through more than 50 years the officers and members of the union have labored as best they could in behalf of the mine workers for the purpose of improving their conditions of employment, their standards of living, increasing their wages and lessening the excessive hours which they are required to spend at their hazardous occupations. Although it is true that the United Mine Workers of America might properly be called a powerful union, it has never had the power to accomplish for its members all the beneficient purposes and advantages which it sought to accomplish and achieve be- [fol. 23] cause it had opposed to it vast aggregations of capital closely knit together in huge associations of coal operators and others whose uniform policy over the long period aforesaid has been to resist and oppose the defendants' demands and efforts in behalf of the men working in coal mines.

15

Subject to the materiality and admissibility thereof defendants admit the averments of Paragraph 5 of Division III of the Complaint, entitled "Wage Agreements."

16

Answering Paragraph 6 of Division III of the Complaint, entitled "Wage Agreements" defendants say that because of the provisions of the Fair Labor Standards Act of 1938 the employees of the plaintiff could not as a matter of

law accept in full settlement and satisfaction of the plaintiff's obligation to them any computation and payment which did not pay said employees for overtime worktime they spent in the employment of the plaintiff under the provisions of said Act. Furthermore, all parties hereto have clearly understood at all times since March 10, 1943 that the mine workers employed by the plaintiff were claiming travel time was worktime under the Act in the period since April 1, 1943.

17

Answering Paragraph 7 of Division III of the Complaint, entitled "Wage Agreements" defendants admit that the wages paid by plaintiff to its underground workers did not violate the minimum wage provisions of the Fair Labor Standards Act. Defendants say, however, that the maximum hours of work in the regular work week of the plaintiff's employees were and are greater than the maximum hours provided in said Act. Defendants further say that the plaintiff has not paid its employees for all time worked in excess of the regular work week as required by the pro-
[fol. 24] visions of the Fair Labor Standards Act of 1938. The employees of the plaintiff have worked for the plaintiff many overtime hours for which they were and are entitled to pay under the provisions of the Fair Labor Standards Act of 1938 and for which they have never at any time been paid.

18

Answering Paragraph 8 of Division III of the Complaint, entitled "Wage Agreements", defendants deny the averment that none of them, nor any one for them, at any time prior to March, 1943, had ever asserted any claim "for payment for any of the time consumed in traveling from the mine portal to the usual working place and return to the portal", and say that, on the contrary, defendants, by their representatives, have on different occasions and in defferent years prior to March, 1943, contended and claimed in their negotiations with their employees that travel time in the mine is work time and should be compensated.

And these defendants say that before the announcement of the decision in the case of Tennessee Coal, Iron and Railroad Company vs. Muscoda Local Union, by the United States Circuit Court of Appeals, Fifth Circuit, on March

16, 1943, and to wit, on March 4, 1943, the Scale Committee of the United Mine Workers of America formulated for submission to the anthracite joint wage conference a proposal that the maximum hour provisions of the joint agreement be modified "to conform with the basic and legal requirements of the industry, the maximum hourly provisions of the agreement shall be amended to establish portal-to-portal for starting and quitting time for all underground workers with the stipulation that present conditions and standards as affecting contract miners and their laborers shall not be changed thereby."

And these defendants say that on March 9, 1943, the International Policy Committee of the United Mine Workers of America formulated, and on March 10, 1943, submitted to the Appalachian Joint Wage Conference in New York its proposal that the maximum hours and working time provisions of the Appalachian Joint Wage Agreement be revised and modified "to conform with the basic and [fol. 25] legal requirements for the industry, the maximum hours and working time provisions be amended to establish portal-to-portal for starting and quitting time for all underground workers."

The matters alleged in the two preceding paragraphs were publicized throughout the industry.

19

Defendants admit the averments of Paragraph 1 of Division IV of the Complaint, entitled "The Defendants."

20

For the purpose of this suit only the defendants admit the allegations of Paragraph 2 of Division IV of the Complaint, entitled "The Defendants."

21

Paragraph 3 of Division IV of the Complaint, entitled "The Defendants" requires no answer from these defendants.

22

Paragraph 4 of Division IV of the Complaint, entitled "The Defendants" requires no answer from these defendants.

23

Answering the averments of Paragraph 1 of Division V of the Complaint, entitled "Statement of Controversy", these defendants say that the controversy does not grow out of the facts merely as stated in the Complaint. There is an actual controversy between the plaintiff and the defendants which arises out of the facts of the employment as hereinabove set out.

24

Answering Paragraph 2 of Division V of the Complaint, entitled "Statement of Controversy", the defendants admit that plaintiff makes the assertions contained in sub-paragraphs (a) (b) (c) and (d), the correctness of which these defendants deny.

25

Answering sub-paragraphs (a), (b) and (c) of Division V of the Complaint, entitled "Statement of Controversy", which purport to set up the contentions of the defendants, these defendants say that their contentions have not been [fol. 26] accurately stated in the Complaint. These defendants contend that "worktime" begins when the employee comes under the control, direction or supervision of the employer and continues until he is released from such control, direction or supervision, excepting only the period prescribed for lunch. The defendants further contend that the Fair Labor Standards Act requires as a matter of law, the inclusion of such time in the computation of the workweek.

The defendants further contend that notwithstanding any payment and acceptance thereof under any wage agreement of a sum less than the plaintiff was required to pay the defendants under the provisions of the Fair Labor Standards Act of 1938 and notwithstanding any interpretation of the law by any one, the defendants are as a matter of law entitled to the benefits of the Fair Labor Standards Act of 1938.

26

Answering Division VI of the Complaint, entitled "Demand for Judgment" these defendants deny that the plaintiffs are entitled to the judgment prayed. On the contrary, these defendants respectfully submit that they are entitled to a declaratory judgment in their own favor upholding

the contentions of the defendants as herein made. The defendants do ask for such judgment at the hands of this court. They further ask that this court appoint a Special Master to ascertain and report to this court the amount due each defendant employee and former employees of the plaintiff as overtime compensation under the Fair Labor Standards Act and that upon the rendition of such report this court enter a judgment for the amount so ascertained [fol. 27] together with an additional equal amount as liquidated damages, reasonable attorneys' fees and the cost of this action. These defendants do further ask that the court consider this answer as a counter claim in behalf of the defendant employees and former employees of the plaintiff, and that the plaintiff be required to answer it as such.

(s) Crampton Harris, 1618-20 First National Building, Birmingham, Alabama. Leonard G. Muse, 306-17 Boxley Building, Roanoke, Virginia. Frank W. Rogers, 306-17 Boxley Building, Roanoke, Virginia. Welly K. Hopkins, United Mine Workers Building, 900-15th St., N. W., Washington, D. C. Attorneys for Defendants.

[fol. 28] CERTIFICATE OF SERVICE

I, Leonard G. Muse, do hereby certify that I am of counsel for the defendants in Civil Action No. 73 entitled Jewell Ridge Coal Corporation, Plaintiff, v. Local No. 6167, United Mine Workers of America et al., Defendants, now pending in the United States District Court for the Western District of Virginia at Abingdon, and I do hereby certify that this 7th day of September, 1943, I have served upon William A. Stuart, Esq., Attorney at Law, Abingdon, Virginia, and George Richardson, Jr., Esq., c/o Messrs. Richardson & Kemper, 506 Commercial Bank Bldg., Bluefield, West Virginia, counsel of record for the plaintiff, a copy of the defendants' answer by mailing this 7th day of September, 1943, a copy thereof to each of them at the above addresses with postage prepaid.

(s) Leonard G. Muse.

[fol. 29] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

[File endorsement omitted]

AMENDMENT TO ANSWER AND COUNTERCLAIM OF DEFENDANTS —Filed by leave of Court November 6, 1943

Come now the defendants in further answer to the complaint and say that they will not further assert their claim for pay for travel time spent in the mines prior to midnight March 31, 1943, the expiration date specified in the contract mentioned in the complaint between the plaintiff and the United Mine Workers of America.

/S/. Crampton Harris, 1618-20 First Nat'l Bank Bldg., Birmingham, Alabama. Leonard G. Muse, 306-17 Boxley Bldg., Roanoke, Virginia. Frank W. Rogers, 306-17 Boxley Bldg., Roanoke, Virginia. Welly K. Hopkins, United Mine Workers Bldg., 900 15th St., N. W., Washington, D. C. Attorneys for Defendants.

[fol. 30] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

[File endorsement omitted]

PLAINTIFF'S ANSWER TO DEFENDANTS' COUNTERCLAIM—Filed September 27, 1943

1. The plaintiff denies that it is in any wise liable under the counter-claim advanced by the defendants in Paragraph numbered 26 of the answer heretofore filed by them herein.

/S/. Wm. A. Stuart, Abingdon, Va. George Richardson, Jr., 506 Commercial Bank Building, Bluefield, W. Va. Attorneys for Plaintiff.

I, Wm. A. Stuart, of counsel for plaintiff in the above entitled action, do hereby certify that on September 27, 1943, I served the foregoing answer to the defendants' counter-claim upon the defendants by mailing a copy of said answer to the counsel of record for defendants, namely, Crampton Harris, 1618-20 First National Building, Bir-

mingham, Alabama, Leonard G. Muse, 306-17 Boxley Building, Roanoke, Virginia, Frank W. Rogers, 306-17 Boxley Building, Roanoke, Virginia, and Welly K. Hopkins, United Mine Workers Building, 900-15th St., N.W., Washington, D. C.

Given under my hand this 27th day of September, 1943.

/S/. Wm. A. Stuart.

[fol. 31] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted]

ORDER ON APPLICANT FOR INTERVENTION—Filed October 30, 1943

Upon the motion of Southern Coal Producers Association, a corporation, for leave to intervene as a plaintiff in this action, filed herein on October 9, 1943, the written memorandum in support of said motion filed October 26, 1943, the objections of defendants to said motion, filed October 27, 1943, and the oral argument of counsel, both in support of, and in opposition to, said motion, heard in open court at Lynchburg on October 27, 1943, it appearing to the Court, for reasons fully stated in a memorandum of opinion this day filed, that the applicant for intervention has no absolute right of intervention under the provisions of Rule 24, Federal Rules of Civil Procedure, and the Court being further of the opinion that in the exercise of its discretion under the provisions of Rule 24, Federal Rules of Civil Procedure, as to permissive intervention, the applicant should not be permitted to intervene, doth so adjudge. It is accordingly ordered that the motion of the said Southern Coal Producers Association, for leave to intervene as plaintiff in this action, be, and the same is hereby denied; to which action of the Court in denying its said motion, the said applicant, Southern Coal Producers Association, by counsel, duly objected and excepted for reasons fully stated to the Court.

And it further appearing to the Court that the applicant, Southern Coal Producers Association, represents numerous operators of bituminous coal mines in the Southern

Appalachian area similarly situated to the plaintiff herein, [fol. 32] which operators have present or contingent controversies similar to that presented in this action, it is ordered that the applicant, Southern Coal Producers Association, if it be so advised, be, and it hereby is, granted leave to participate, by its counsel, in the trial of this action, to argue the same, and to file briefs herein, as an *amicus curiae*.

And it is further ordered that the Clerk of this Court certify and mail copies hereof, together with uncertified copies of the Court's Memorandum of Opinion this day filed, to George Richardson, Jr., Esquire, Attorney at Law, 506 Commercial Bank Building, Bluefield, West Virginia, attorney for the plaintiff, William A. Stuart, Esquire, Attorney at Law, Abingdon, Virginia, attorney for the plaintiff and for the applicant for intervention, Crampton Harris, Esquire, Attorney at Law, 1618-20 First National Bank Building, Birmingham, Alabama, Leonard G. Muse, Esquire, Attorney at Law, 306-317 Boxley Building, Roanoke, Virginia, and Welly K. Hopkins, Attorney at Law, United Mine Workers Building, 900 15th St., N.W., Washington, D. C., attorneys for the defendants, and to Edward R. Burke, Esquire, Attorney at Law, 515 Southern Building, Washington, D. C., and John C. Gall, Esquire, Attorney at Law, 701 Southern Building, Washington, D. C. attorneys for the applicant for intervention.

Enter:

A. D. Barksdale, United States District Judge.

[fol. 33] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted]

PRETRIAL ORDER—Entered and filed November 5, 1943

A pretrial conference having been this day held in the Judge's Chambers at Roanoke, at which counsel for both plaintiff and all defendants were present, the action taken at such conference is hereby recited as follows:

(1) Upon the motion of the defendants, by counsel, leave is granted them to file their "Amendment to Answer and Counterclaim", and the same is accordingly filed.

(2) By agreement of the parties, by counsel, it is stipulated as follows:

(a) That this action is brought in the correct name of the proper plaintiff, and includes all necessary defendants, the names of the defendants are correctly stated except that defendant, Local No. 7337, is erroneously designated in the complaint and should be designated as Local No. 7327; and, on motion of the plaintiff, it is ordered that the complaint be, and it hereby is, so amended;

(b) In paragraph 6 of Section III of the complaint, the agreement referred to as "the said Wage Agreement of March 12, 1939" is incorrectly designated, and should be designated as "the said Wage Agreement of May 12, 1939", and, on motion of the plaintiff, it is ordered that the complaint be, and it hereby is, so amended.

(3) As so amended, it is conceded by defendants that Section I of the complaint is true and correct with the exception of certain allegations not material to the issues.

[fol. 34] (4) As to Section II, defendants concede the truth and correctness of paragraphs 1 and 2.

(5) As to paragraphs 3, 4, 5, 6 and 7, of Section II, defendants make no admission. Such paragraphs constitute plaintiff's allegation of its method of operation of its mines. Defendants' contention as to the method of operation of plaintiff's mines is set out in paragraphs 6 to 10, inclusive, of their answer.

(6) As to Section III, defendants concede that paragraph 1 is true and correct except that defendants deny that there was any contract between plaintiff and defendants in effect subsequent to March 31, 1943.

(7) Defendants concede that paragraphs 2, 3 and 5, of Section III, are true and correct, but do not concede the materiality or admissibility of the facts therein alleged.

(8) Defendants concede that paragraph 6, of Section III, is true and correct except insofar as it may allege a legal conclusion, but do not concede the materiality or admissibility of the facts therein alleged.

(9) Defendants make no admission as to paragraph 7, of Section III, which states plaintiff's contention in that regard; defendants' contention upon the subject being contained in paragraph 17 of their answer.

(10) Defendants make no admission as to paragraph 8, of Section III, which states plaintiff's contention in that regard: defendants' contention upon the subject being contained in paragraph 18 of their answer.

(11) As to Section IV, defendants concede that paragraph 1 is true and correct, and paragraph 2 is admitted [fol. 35] for the purposes of this action.

(12) It is further stipulated and agreed by all parties, by counsel, that the issues to be tried in this action are as follows:

a. What constitutes the working time which makes up the work week of plaintiff's underground employees within the meaning of Section 7 of the Fair Labor Standards Act of 1938, and what amounts, if any, are due and unpaid to such employees under said Section, the determination of such amounts, if any, to be later referred to a special master:

(1) In reference to "a" above, the plaintiff contends that such work week does not include that portion of the time spent by its underground employees in being transported or walking to and from their usual working places.

(2) In reference to "a" above, the defendants contend that such work week includes all the time from the time such employees are required to report and do report for work at the portal of the mine until they return to the portal at the end of the shift, less the regular lunch period when they are relieved of all duties.

(13) It is further stipulated and agreed that:

a. Plaintiff is a corporation organized under the laws of the State of Virginia and was incorporated prior to October 24, 1938, and

b. That this is a class action binding upon and inuring to the benefit of all plaintiff's underground employees.

(14) It is further ordered that this action be, and the same is, hereby set down for trial in the Court Room of this Court, at Roanoke, at 9:30 o'clock A. M., Wednesday, November 17, 1943, by the Court without a jury.

[fol. 36] (15) And it is further ordered that the Clerk certify and mail copies hereof to George Richardson, Jr., Esq., 506 Commercial Bank Building, Bluefield, West Virginia, and William A. Stuart, Esq., Abingdon, Virginia, attorneys for the plaintiff, to Crampton Harris, Esq., 1618-20 First National Bank Building, Birmingham, Alabama, Frank W. Rogers, Esq., 306-317 Boxley Building, Roanoke, Virginia, Leonard G. Muse, Esq., 306-317 Boxley Building, Roanoke, Virginia, and Welly K. Hopkins, Esq., United Mine Workers Building, 900 15th Street, N. W., Washington, D. C., attorneys for the defendants; and to Edward R. Burke, Esq., 515 Southern Building, Washington, D. C., and John C. Gall, Esq., 701 Southern Building, Washington, D. C., attorney for Southern Coal Producers Association, *amicus curiae*.

Enter:

(S.) A. D. Barksdale, United States District Judge.

[fols. 37-39] In United States District Court

[Title omitted]

Statement of Evidence

Tried before Hon. A. D. Barksdale, District Judge, at Roanoke, Virginia, on November 17, 18, 19, 20, 22, 23 and 24, 1943.

Appearances:

For the Plaintiff:—Messrs. Richardson and Kemper, George Richardson, Jr., Esq., Bluefield, West Virginia. Messrs. Penn, Stuart and Phillips, William A. Stuart, Esq., Abingdon, Virginia.

Amici Curiae:—Edward R. Burke, Esq., Washington, D. C. John C. Gall, Esq., Washington, D. C.

For the Defendants:—Crampton Harris, Esq., Birmingham, Alabama. Mesrs. Woods, Chitwood, Coxe and Rogers, Frank W. Rogers, Esq., Leonard G. Muse, Esq., Roanoke, Virginia. T. C. Townsend, Esq., Charleston, West Virginia.

[fol. 40] COLLOQUY

Be It Remembered, that upon the trial of this case, on Wednesday, the 17th day of November, 1943, the following proceedings were had:

By Mr. Rogers: If your Honor please, I think we can perhaps save a good deal of time if we can have some understanding about objections to the materiality of evidence. As your Honor will recall, in the amended answer, we admitted, subject to materiality, a great many of the allegations of the bill of complaint. Your Honor will further recall that when we filed our amended answer, stating that we would not assert any claim for anything that occurred prior to April 1st, 1943, we also raised further questions of materiality. In view of the fact that both sides have waived a jury and are submitting to the Court all questions of both law and fact, it occurs to us that we could save a good deal of time if we could have some understanding that unless we saw fit to object to some evidence on the ground of materiality at the time it was being introduced, that we could let it all go in with the understanding that we did not thereby concede its materiality, but would be free to raise that point when it came time for the argument.

By the Court: Is there any objection to that procedure?

By Mr. Rogers: I think that applies to any testimony, that if either side wants to object to it at the time, they can, but their failure to object at the time would not be construed as a waiver of the subsequent right to question the materiality when it comes time for argument.

By the Court: It would be my general impression if you didn't object at the time, you could later move to strike it out, if you made such a motion before the close of the case.

[fol. 41] By Mr. Richardson: I should be entirely agreeable to that, with this understanding: That we should like to be apprised as to the nature of objections as we go along, as I am sure the Court would.

By the Court: I don't think the objection or motion to strike would be timely unless made before the case was closed. A witness might be excused who might be recalled by reason of an objection.

By Mr. Rogers: We didn't have in mind any objection to the competency of a witness, but merely as to the materiality, which, after all, is a question of law to be covered

in the argument. If counsel for the other side prefer, we will follow the usual procedure.

By Mr. Richardson: It occurs to me what Mr. Rogers says is very sensible and we concur in that view. I merely didn't wish to be surprised by any objections, the nature of which I had no reason to anticipate, and if that is borne in mind, I am sure we can proceed on that basis.

By the Court: I think so. Certainly, to a line of questions, it would be unnecessary to object to each one. You might indicate an objection to that general line, and when it is through, you can make a motion to strike out later.

And, Thereupon, Be It Further Remembered, that the plaintiff, to maintain the issues on its behalf, introduced the following evidence, to-wit:—

Huston St. Clair, a witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

[fol. 42] Direct-examination.

By Mr. Richardson:

Q. 1. I believe your name is Huston St. Clair?

A. That's correct.

Q. 2. Where is your residence?

A. My legal residence is in Tazewell, Virginia. My domicile is in Bluefield, West Virginia.

Q. 3. You are a medical doctor?

A. Yes.

Q. 4. What is your connection with the Jewell Ridge Coal Corporation, the plaintiff in this action?

A. I am President,—since 1939.

Q. 5. How long have you been connected with that corporation?

A. I have been actively connected as an officer since 1932.

Q. 6. Have you had some association with it longer than that?

A. Since 1913, when I was first employed.

Q. 7. I believe your father, Mr. George W. St. Clair, was, in his life time, the President of this corporation?

A. That's correct.

Q. 8. You say you are now President, Dr. St. Clair. What other positions have you held with this company?

A. I was Vice-President from 1932 to 1939. Previously, I had worked during several summer periods at various occupations.

Q. 9. When did that begin?

A. I thought it began in 1913, but I was not actually employed. I spent the summer there and I was employed there in '14, '15, '16, '19, and one year in the early twenties.

[fol. 43] Q. 10. What were you doing at the mine in those early years?

A. I worked in various jobs. I clerked in the store in 1913. I worked in the machine shop and worked on the track and worked in the sawmill and I loaded coal, and I may have had some other jobs for a short period.

Q. 11. In short, you have had some contact with the various activities around this coal mine and have become, through actual experience, familiar with its operation?

A. That's right.

Q. 12. Did you have some experience in selling the coal from this mine?

A. I spent most of my time from the middle of 1932 to June, 1933, traveling in the sales territory for the principal purpose of getting acquainted with the distribution of our coal and other coals. I was sales manager of Virginia Smokeless Coal Company from 1933 to 1934.

Q. 13. The Virginia Smokeless Coal Company had what relation to the plaintiff company?

A. That's the exclusive sales agent for the coal produced by Jewell Ridge. I have had general supervision of that sales company since 1934.

Q. 14. These activities you speak of for Virginia Smokeless Coal Company were in reference to the sale of this coal?

A. Yes.

Q. 15. You say you have been the President of this Company since 1939?

A. Since November, 1939.

[fol. 44] Q. 16. I wish you would state to the Court why this action was instituted.

A. This action was instituted because in March of this year a demand was made for a change in the method of computing work time to provide for payment for travel time from portal to portal. This involved a considerable past liability, a considerable increase in the cost of mining coal, both for the present and for the future. This claim

was based on compliance with the law, and in an effort to determine what the law requires and to know what our liability may be, we determined to ask for a declaratory judgment.

Q. 17. Is your Company, the plaintiff here, a member of any Association of coal mining operators?

A. It is a member of the National Coal Association and the Southern Coal Producers Association.

Q. 18. I wish you would tell the Court what, if any, contact you had with that Association of which your company is a member before instituting this action, and the reason for that.

A. Prior to instituting this suit, being members of the Southern Coal Producers Association, and realizing that such action would affect the other members of the Southern Coal Producers Association, I went to Washington and told the directors of the Southern Coal Producers Association that we contemplated filing a suit for declaratory judgment, and gave them our reasons for doing so, and told them that we would like to have their approval, or, at least, to hear any objections that they might have to such action being taken. We further requested that they paricipate in interest in the case, but that we, as a company, wanted to institute this suit and follow it thorugh. [fol. 45] Q. 19. And you have done so since?

A. That's correct.

Q. 20. Dr. St. Clair, some question has arisen as to the present appropriateness of this litigation. What have you to say about that? Have these questions that you mentioned been settled?

By Mr. Rogers: Objection. We can see no connection between Dr. St. Clair's idea of the appropriateness of this action and the merits involved.

Which objection was overruled by the Court, to which ruling the defendants excepted.

A. Since this suit was instituted, there has been an arrangement made between the United States Government and the United Mine Workers, which has provisions relating to travel time, but rather than settle those questions, it has at least for the present created more confusion. Even though it may settle the questions in the near future, it would be only for the period of Governmental control,

following which the operators and United Mine Workers would have to reach, by agreement, another contract, and the fact that the operators have payment for travel time included under the present arrangement does not indicate a voluntary assumption of that payment on the part of the operators. It is under duress of the conditions and was imposed upon them by Governmental action. The future importance of the payment for travel time is such that we consider it is possibly even more important than ever for this case to be determined.

Q. 21. You refer to travel time. Just what do you mean by that, Dr. St. Clair?

[fol. 46] A. Under the collective bargaining between the United Mine Workers and the Operators, through long established custom, payment has been made from face to face—that is, payment began at the time the man gets to his working place and ends at the time the man leaves his working place. Travel time includes that time necessary to be spent by the man in going from the portal or entrance to the mine to his working place and returning from his working place to the portal.

Q. 22. That is to say, the travel time is the time consumed in getting to the place where the men have been accustomed to perform their duties underground?

A. That's right, in getting to and from.

Q. 23. In the early days of your experience with this mine, as you recall it, how was the travel to the working places performed by the men who worked underground?

A. In the early days, in my first experience there, all travel was by foot,—in other words, the men walked to their working places. It was a relatively new mine and the distances were not great, and there was no provision made for transporting men.

Q. 24. At that time what sort of power was used in the mine?

A. The haulage in the mine was done by mules.

Q. 25. And you say then all of the men walked from the entrance of the mine to their working places inside?

A. They walked unless occasionally they would get in a mule-drawn car and ride in, but as a normal thing, they walked.

Q. 26. During the time that you were working about the mine,—I believe you said from 1913 through 1919, did you make a change at the mine in the power for operation?

[fol. 47] A. Yes. I believe it was in 1915 we built a little power plant and electrified the mine, not completely, but at least through the main haulage. We continued for a time to use mule haulage in the sections, and gradually it was electrified throughout.

Q. 27. That electric power was used then for hauling the cars that moved the coal out of the mines?

A. Yes.

Q. 28. Did the men continue to catch rides, as you say?

A. Yes. They gradually developed, as the distances increased, the practice of waiting to take men in, but without the organized mantrip as it is known today, and also to bringing men out, but a good many of them would walk out. Some of them would stay in longer so they could clean up their working places and walk out, and some would finish cleaning up earlier and walk out.

Q. 29. What means, if any, are provided by the Company now for taking the men into and bringing them out of the mine?

A. We have the same means as we had then, except that the mantrips are provided now, on schedule, and the majority of men ride these mantrips as a regular practice, but some of them still walk in and walk out.

Q. 30. What brought about the orderly arrangement of a system of mantrips?

A. The increasing length of the haulway, the increasing number of employees, and an attempt to achieve more orderliness in the operation of the mine.

Q. 31. Was the safety of the men a factor?

A. Yes.

[fol. 48] Q. 32. Does a *d*upervised mantrip promote safety?

A. I believe it does promote safety, because in each mine, there are several hundred men employed. It is safer to have an organized means of entrance by mantrips than it is to have a large number of men walking around through the mines.

Q. 33. I referred to this as "supervised mantrips". Are they supervised?

A. They are supervised for safety.

Q. 34. They are arranged according to schedules, are they?

A. Yes, they are. We have a regular starting time inside at the regular working places of the employees, and

these mantrips are arranged so they will arrive there to permit the men to arrive at their working places at their scheduled time.

Q. 35. Aside from promoting safety, Dr. St. Clair, how does the system of mantrips serve the men?

A. Well, it saves time for the men, saves their energy, and by saving their energy, it would promote greater productiveness for the piece-workers. Other than the safety and the saving of time and energy I don't know of any particular benefit they receive.

Q. 36. Is it of advantage to the Company also?

A. Yes, it it.

Q. 37. I wish you would state to the Court what advantages you may see in it to the Company.

A. The company receives a benefit from anything that improves safety. Furthermore, the orderliness which permits a foreman to get his men on the section at the same time, and the increased productiveness that is presumed to result from the saving of energy by the men riding rather than walking to their work is a benefit to the Company.

[fol. 49] Q. 38. Is it of some expense to the Company?

A. It is an expense by the fact that the mantrips have to run, taking the empties in and bringing empties out to return the men after their work shift, and it also interferes with haulage, and is an expense by such interference. That is, the haulage of coal.

Q. 39. Is all of the expense of operating these mantrips for moving the men from the outside to their working places inside the mine borne by the company?

A. Yes, sir.

Q. 40. Is any charge made to the men for hauling them over that system?

A. No.

Q. 41. You referred a while ago to the face to face basis of pay. I wish you would describe that a little more fully, so that the Court will understand clearly what you mean by that basis of pay.

A. By agreement between the Operators and the United Mine Workers, payment was made for work performed at the working place. That was generally spoken of as face to face, which applies more particularly to the coal loaders who actually work at the face, that is where the coal is being produced, but was extended by general understand-

ing so that it means the inside men at their working place, wherever that may be. It includes all of the duties performed by the employee. In the case of the coal loader, that includes timbering and handling of slate, and other duties, varying some in different mines because of prevailing customs, but taking care of the work that he is required to do at his usual working place. In the case of the other men, such as the company men who work on the track, it provides payment for them while they are at the place where they are required to perform their duties. [fol. 50] Q. 42. Has the face to face basis of pay or method of measuring the day's work prevailed in this industry throughout your acquaintance with the operation of this mine?

A. It has prevailed at our mines from the beginning of their operation, one in 1910 and the other in 1936, and from my association with other members of the industry, it has prevailed generally throughout the industry.

Q. 43. Has that association been broad throughout the entire eastern section of the United States where coal is mined?

A. I frequently come in contact with a fairly large number of other operators.

Q. 44. And from that, are you prepared to say that this face to face basis of pay has obtained universally throughout the bituminous coal mining industry in the Appalachian area of the United States?

A. It has, and is so provided in the contract which is applicable to all the mines in the Appalachian area with a very few exceptions, and those have the same basis, I understand, as the mines operating under the agreement with the United Mine Workers. I am speaking now of the same basis so far as face to face is concerned.

Q. 45. You refer to the contract. By that, do you mean the contract between your company and the United Mine Workers?

A. I referred to the General Appalachian Agreement. We have an agreement in our Company which includes the basic Appalachian Agreement, and District Agreement and Local Agreement.

Q. 46. And it was to that contract that you referred?

A. Yes.

Q. 47. You do have a contract with the Mine Workers at the mines operated by the plaintiff company, do you not?

[fol. 51] A. The Company has a contract at Jewell Ridge and at Jewell Valley, the two mines operated by the Company.

Q. 48. And that's with the United Miné Workers of America?

A. That's correct.

Q. 49. When was the Union first formed at these mines?

A. Our first agreement followed closely after the organization of the employees into a Union at Jewell Ridge in 1933. The Jewell Valley mine was opened in 1936, and operated under a formal agreement in 1937.

Q. 50. Before 1933, you had no Union at these mines?

A. We did not have.

Q. 51. And did you have individual contracts with your workers?

A. We had no formal contracts. We had the customary employer-employee relationship of employment.

Q. 52. When you were working on the basis of the individual arrangement with the mine workers, did this face to face basis of measuring the day's work prevail?

A. Yes, it did.

Q. 53. And that had continued, I believe you say, from the time this mine first opened?

A. That's correct.

Q. 54. Now, when the Union was formed in 1933, was there any departure from that basic arrangement?

A. In so far as the custom of measuring the work time from face to face, there was no departure.

Q. 55. Dr. St. Clair, in the summer of 1933, when you say the Union was formed at your mine, there was a proceeding, was there not, under the National Industrial Recovery Act, for the preparation of a general Code of Fair Competition for the Bituminous Coal Mining Industry?

[fol. 52] A. Yes, there was.

Q. 56. Did there come out of that proceeding a Code to govern the Bituminous Coal Mining Industry?

A. Yes, sir.

By Mr. Richardson: If Your Honor please, we tender and ask leave to file as "Plaintiff's Exhibit No. 1" a document entitled: "Code of Fair Competition for the Bituminous Coal Industry", which has been inspected and accepted as correct in text by counsel for the defendants.

By Senator Muse: In order to keep Mr. Richardson from being surprised, we are going to object to that document, as to its materiality. We do object now. As to its authenticity, we raised no question.

By the Court: I shall treat your objection as a motion to strike out and take it under advisement.

By Mr. Richardson: May I inquire the reasons for the basis of that objection?

By the Court: He objected on the ground of materiality. Do you wish to amplify that?

By Col. Harris: I will be glad to, Your Honor, if you care to hear it.

By the Court: If you wish to amplify the basis of your objection, we will be glad to hear that.

By Col. Harris: I am afraid anything further would be a matter of argument. I might indicate the position we will take. It is our position, if the Court pleases, that the question in this case is a very simple question of fact, whether travel time is work time, what enters into the work week under Section 7 of the Fair Labor Standards Act. If it is work, then any contracts or agreements, or anything else, custom, tradition, practices, all go out the window if they are violative of the Act of Congress. We have here and will be prepared, on argument, to give Your Honor decisions, saying that contracts, whether made before or after the passage of the Fair Labor Standards Act, if violative of the Act, have no binding effect. The parties cannot remove their transactions from the dominant constitutional authority by making contracts about them, so we say that this, a code made under the NIRA, in 1933 or 1934, which is three or four years before the Fair Labor Standards Act was passed, which went into effect on October 4, 1938, can throw no light on the question [fol. 53] before this Court, so that all documents which they have, in so far as they attempt to or are offered for the purpose of nullifying the Act of Congress, are legally inadmissible and immaterial. Furthermore, without in any sense departing from that, our amendment waives any claims so far as the defendants are concerned, for any back pay prior to the expiration date specified in the contract,—that expiration date being midnight of March 31st, 1943, and there has been no contract since then, and that any old contracts which do not involve any question now before the Court are wholly immaterial and that the pres-

ent situation since April 1st, 1943, is a situation where there is no contract, no waiver, but under the undisputed evidence, a demand for portal to portal pay made in March, 1943, so that we have the simple situation from April to the present time, governed by the Fair Labor Standards Act, on a question of fact.

By Mr. Richardson: The Colonel's statement is very helpful, and I am obliged to him and to the Court for permitting me to ask it. The basis of our offering these documents is that we disagree with him on the fundamental issue in that we do not conceive that this matter is limited to the factual base which he states, but that it includes also the intent of the Congress in this enactment, and that these documents will assist the Court in determining that part of the issue.

By the Court: Well, I am going to take the question, which I am inclined to think will be a recurring question of the admissibility of not only this document but others of a similar character, under advisement and pass upon them later. I don't suppose it will be seriously controverted that the proposition of a contract between the parties cannot abrogate the provisions of the Wage and Hour Act. However, I am inclined at this point to think that documents and other evidence showing the historical relationship existing between the employers and employees in this industry are material and should be considered by the Court, and I will reserve final determination.

By Mr. Richardson: To clarify our position, if the Court please, Colonel Harris made two points as the basis of the objections, one, that the issue before the Court is a simple issue of fact. The other, he made the statement, or the contention, that no contract has existed since April 1, 1943, or March 31st, 1943. It is our position on that latter question that there has in contemplation of law existed a continuing contract at all times since March 31st, 1943, that the construction of the predecessor contract of which it was an extension, and therefore, anything which throws [fol. 54] light on the construction of the contract which ran up to March 31, 1943, is relevant on the question of the construction of the contract which we contend has been in existence in contemplation of law since then.

By the Court: Your relative contentions about that were made pretty clear at the pre-trial conference.

By Senator Muse: We would like our objections to go to all such documents.

By the Court: It probably would be better, as each document is tendered, to make an objection for the reasons previously stated.

The document referred to was thereupon filed, marked as indicated, and is returned as a part of this transcript.

By Mr. Richardson:

Q. 57. Following the promulgation of the general Code of Fair Competition for the Bituminous Coal Mining Industry in September, 1933, under the National Industrial Recovery Act, was there, in the spring following, an amendment adopted to that Code, changing the basic hours of work?

A. In the spring of 1934?

Q. 58. Yes.

A. Yes, sir.

Q. 59. What change was effected?

A. There was a reduction of hours of work from eight hours to seven hours per day.

Q. 60. Was the basic day still determined by the hours of work at the face?

A. At the usual working place, I believe it was stated.

Q. 61. That "at the usual working place" is the formula written into these contracts to denote the face to face method, as you have called it?

[fol. 55] A. That is right.

By Mr. Richardson: We now submit and ask leave to file, if Your Honor please, as "Plaintiff's Exhibit No. 2", a copy of Amendment No. 1 to the National Recovery Administration Code of Fair Competition for the Bituminous Coal Mining Industry, as approved on March 31st, 1934. This document has also been verified as to authenticity.

By the Court: The defendants object for the reasons already stated, and the Court treats the objection as a motion to strike out and takes it under advisement.

The document referred to was thereupon filed, marked as indicated, and is returned as a part of this transcript.

By Mr. Richardson: Along with the two documents that have been introduced, we tender and ask leave to file as

"Plaintiff's Exhibit No. 3", a pamphlet showing a Code of Fair Competition for the Bituminous Coal Industry as approved on September 18, 1933, by President Roosevelt, which includes Amendments 1 to 3, inclusive, of the Code of Fair Competition for the Bituminous Coal Mining Industry.

By the Court: I will take it that all documents which you tender have been approved by the defendants as to authenticity, unless you state otherwise.

By Mr. Richardson: That is a fact.

By the Court: Let the document be received, with the same objection and under the same conditions as stated by the Court.

The document referred to was thereupon filed, marked as indicated, and is returned as a part of this transcript.

By Mr. Richardson:

Q. 62. Doctor St. Clair, just what is meant by the term "Appalachian Agreement in the matter of the Union contract?

A. That's an agreement arrived at between the United Mine Workers, International Union, and various District Unions within the Appalachian Area, and the operators, either through their Associations or individual companies within the same area.

Q. 63. Is your company, the plaintiff here, within that area?

A. Yes, it is.

[fol. 56] Q. 64. Was your Company represented in and included as to the Appalachian Agreement which was made with the United Mine Workers of America in September, 1933?

A. It was represented by agreement with the United Mine Workers.

By Mr. Rogers: We don't want to raise any technical objection but it may be of some importance. I will ask Mr. Richardson if he will develop in his examination the fact that that agreement doesn't become binding on any local company or on your company until it is signed by your company and by the District Union.

Q. 65. You have heard Mr. Rogers' statement, Dr. St. Clair. Is that accurate as to the means of making this contract obligatory upon your Company?

A. In 1933, we were not represented in the District Conference following the Appalachian Wage Agreement, but by local agreement, signed by the District and by our Company, there was made applicable to our Company the provisions of the Appalachian Agreement.

Q. 66. What do you mean by the District?

A. It is District No. 17 of the United Mine Workers of America, with headquarters in Charleston.

Q. 67. I see some reference to the Smokeless and Appalachian Coal Association. What is that, if you please?

A. District No. 17 of the United Mine Workers comprises the Smokeless Coal Fields, and the operators of the Smokeless Coal Fields, in a District conference, made a further agreement, following the Appalachian Agreement, that is particularly applicable to that District but not in conflict with the Appalachian Agreement.

Q. 68. Was your Company within the Smokeless region and governed by the contract you have referred to as the Smokeless Agreement?

A. That's correct, yes.

[fol. 57] By Mr. Richardson: If the Court please, we now tender and ask leave to file a printed pamphlet which has been verified as to its authenticity, containing a Code of Fair Competition, National Industrial Recovery Administration,—Appalachian Agreement,—Pocahontas-Tug River Agreement, effective October 2, 1933 to April 1, 1934.

By the Court: Let the document be admitted under the same conditions already stated by the Court.

The pamphlet referred to was thereupon filed, marked as indicated, and is returned as a part of this transcript.

Q. 69. Was there an agreement, Dr. St. Clair, between the plaintiff Company and an accredited representative of the United Mine Workers of America about bringing the employe relations of your company within the coverage of the Pocahontas-Tug River contract, a copy of which has just been filed in evidence?

A. There was.

Q. 70. I hand you an original letter or a duplicate original, signed by Van A. Bittner, under date of September 30, 1933, and ask you if that is the agreement by which you were brought within this contract.

A. It is, yes, sir.

By Mr. Richardson: We wish, if Your Honor please, to file this contract.

By the Court: Let it be admitted under the same conditions as the previous documents.

By Mr. Richardson: This is the original document. We should like to file a typewritten copy in lieu of the signed document.

By the Court: I take it there will be no objection to that. Let the copy be substituted and the original withdrawn.

The copy referred to was thereupon filed, marked as "Plaintiff's Exhibit No. 5", and is returned as a part of this transcript.

[fol. 58] Q. 71. The agreement which you have identified and which has been filed as Exhibit No. 4 was a contract effective October 2, 1933, and expiring April 1, 1934, I believe. Was there a new agreement made at the expiration of that contract?

A. Yes, there was.

Q. 72. I hand you here an agreement by and between the Smokeless Coal Board for the Pocahontas-Tug River District, and the United Mine Workers of America, District 17, effective from April 1, 1934, to March 31st, 1935, and ask you if that was the renewal contract which was made and under which you operated these mines for the effective period?

A. This is the renewal contract and the agreement under which we operated. We do have in addition a supplemental agreement, local agreement, which is not in conflict, but has some slight changes in rates, but this is the basic agreement under which we operated.

By Mr. Richardson: With that identification, we tender and ask to file this contract.

By the Court: Let it be admitted under the conditions heretofore stated.

The document referred to was thereupon filed, marked as "Plaintiff's Exhibit No. 6" and is returned as a part of this transcript.

Q. 73. Is there anything in the local agreement to which you refer which bears in any way upon the hours of work or basic day or work week?

A. No.

By Mr. Rogers: I think it would be better, to keep the record straight, to let him file a copy of that subsidiary agreement.

By the Court: Have you got one?

By Mr. Richardson: I wasn't sure whether I had it or not. That's the reason I asked that question, but I will see. [fol 59] ——I don't have it.

By the Court: I will permit the question.

By Mr. Richardson: If we find that agreement we shall be glad to tender it and furnish them with a copy.

Q. 74. As a matter of fact, the local agreement referred only to rates for specified kinds of work?

A. That's correct.

Q. 75. Do you know whether the agreement which you have just identified as the agreement of April 1, 1934, was extended as to its effectiveness beyond the first day of April, 1935?

A. It was to extend to March 31, 1935, but by subsequent agreements between the operators and the United Mine Workers, it was extended to October 1, 1935.

Q. 76. And you continued to operate with your men under that contract until approximately the first of October, 1935?

A. Yes, sir.

Q. 77. At that time, was there a new contract made?

A. There was one made in September to become effective, I believe, October 1, 1935.

Q. 78. I hand you the Smokeless Wage Agreement for the Pocahontas-Tug River District—Appalachian Agreement—Effective April 1, 1935, to April 1, 1937, and ask you if that was the succeeding contract which was made and under which your mine was operated for that period?

A. It is; yes, sir.

By Mr. Richardson: We tender this and ask leave to file it, if the Court please.

By the Court: Let it be received under the same conditions as the previous ones.

[fol. 60] The document referred to was thereupon filed, marked as "Plaintiff's Exhibit No. 7", and is returned as a part of this transcript.

Q. 79. Was there a new contract made upon the expiration of that contract in March, 1937?

A. Yes, there was.

Q. 80. I hand you here the Smokeless Wage Agreement for the Pocahontas-Tug River District—Appalachian Agreement—Effective April 1, 1937, until April 1, 1939, and ask you if this is the succeeding contract?

A. That's correct.

By Mr. Richardson: We wish to file this contract also.

By the Court: Let it be received in evidence under the same conditions as the previous documents.

The document referred to was thereupon filed, marked as "Plaintiff's Exhibit No. 8", and is returned as a part of this transcript.

Q. 81. Was there a renewal contract or another contract made between the same parties at the expiration of the contract you have just identified?

A. There was one made in 1941—1939 to 1941.

Q. 82. I hand you the 'Appalachian and Pocahontas-Tug River Agreements by and between Pocahontas Operators Association and the United Mine Workers of America District 17, and the International Union,—Effective May 12, 1939, until March 31, 1941," and ask you if that is the next succeeding contract which was made between these parties and under which you operated?

A. This is. In 1937, we made our first contract at the [fol. 61] Jewell Valley Mine, which was the same contract as the one previously filed, and the same as this, with certain slight local exceptions where rates are concerned.

Q. 83. I believe you say the Jewell Valley Mine was first opened in 1936?

A. Construction was begun in 1936, but the first formal agreement we had was in 1937.

Q. 84. And this agreement you have identified, "Plaintiff's Exhibit 8' was the first contract made with the Union covering employer-employe relations at that mine?

A. That's right.

Q. 85. The contract you now have in your hand, effective from May 12, 1939, was applicable to both mines of this company?

A. That's right.

By Mr. Richardson: We ask leave to file this document.

By the Court: Let it be received under the same conditions.

The document referred to was thereupon filed, marked as "Plaintiff's Exhibit No. 9", and is returned as a part of this transcript.

Q. 86. Was there a contract made between these parties in 1941 to succeed the contract which you have just identified?

A. Yes, there was.

Q. 87. Here is a copy of "Southern and Pocahontas-Tug River Agreements by and between Pocahontas Operators Association and the United Mine Workers of America District 17, and the International Union—Effective April 1, 1941, until March 31, 1943", as written, and I will ask you if that is the contract under which your company operated its two mines beginning April 1, 1941?

[fol. 62] A. Yes, sir, it is.

By Mr. Richardson: We ask to file this document also.

By the Court: Let it be received under the same conditions.

The document referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 10", and is returned as a part of this transcript.

Q. 88. Dr. St. Clair, there were, you say, certain local agreements between your company and the District or Local of the United Mine Workers of America, in respect to the working at this mine, or these mines?

A. Yes, sir, there were.

Q. 89. Was there anything in any of the local agreements at any time affecting in any way the basic agreement contained in these documents now exhibited in evidence, as to the hours of work or the basis of computation of the work day or work week?

By Mr. Rogers: Objection. We have not objected on this specific ground as these various documents were introduced, because we thought Mr. Richardson was going to follow it up with specific evidence. If we are correct in our understanding, this agreement here, the Southern Agreement, is between all the operators in a certain area and the National organization of the Mine Workers. Now, if my information is correct, that is the general basic contract and

Dr. St. Clair testified that that was the contract under which they worked and he has not yet testified, and the point, we think, may be pertinent, as to whether his company and the representatives of the mine workers ever made that contract applicable to his mine and to the employes of that mine. In other words, if I make it clear, as we understand the situation, this general or basic contract is negotiated between representatives of the operators on the one hand and representatives of the men on the other hand. Then it just covers the broad, general principles. In each District, a separate agreement is negotiated, covering points that are not included in the broad, general contract, and as the result of the negotiation of those separate contracts, then the agreement is adopted, and I thought in most cases it was attached to this, whereby the Local District and the Local Coal Operators Association or the Local Company have got to for- [fol. 63] mally adopt the provisions of this blanket or general contract. Do I make myself clear on that? We didn't object to the introduction of the contract because we felt it was one of those historical documents the Court would want, anyway, and Dr. St. Clair testified they were working under it. There has been no evidence whatever that these were made applicable to his mine by the District Agreement, and we assumed Mr. Richardson would next offer those. Instead of doing that, he has asked a general quesfion as to whether these agreements which made this effective so far as the plaintiff and the defendants here are concerned contained any terms which were different. We think under the proper evidence, those local agreements, which made this applicable to the plaintiff and the defendants in this suit should be offered in evidence.

By the Court: I am inclined to agree with counsel, that if the local agreements are in existence, they should be offered.

By Mr. Richardson: We will give you all we have, Judge.

By the Court: While you check the file on that, the Court will take a recess until 11:00 o'clock.

Court thereupon recessed at 10:45 a. m., until 11:00 a. m., at which time the trial was resumed.

Q. 90. Dr. St. Clair, you have heard what Mr. Rogers said in respect to the District or Local agreements. Please state, for the Court's information, whether the District agreements are included in these printed copies of the agreements which have been identified and filed in evidence?

A. The Appalachian Conference directs the operators and miners of each District to work out their local district problems, and the District Agreement is a part of the Appalachian Agreement. Is that the question?

Q. 91. Your mine is operating under the Pocahontas-Tug River District 17 Agreement, is it not?

A. That's correct, yes.

[fol. 64] Q. 92. Is that District 17 agreement printed in these pamphlets which you have filed in evidence?

A. It is, yes.

Q. 93. So that there is, in each of these pamphlets, the basic or general agreement and the District Agreement applicable particularly to the area in which you operate, and specifically to your company?

A. Yes, each of them until 1941 contained the Appalachian Agreement and the District Agreement, called the Smokeless Wage Agreement. In 1941, it was the Southern Agreement and the District Agreement, printed in each of these, and our local agreements adopted the Appalachian and Smokeless Agreements.

By Mr. Rogers: That was what I wanted. The witness said "Our local agreements adopted the Appalachian and Smokeless Agreements". The basis of my objection was to require the production of these local agreements which adopted the Appalachian and Smokeless Agreements.

By the Court: If the general agreements were adopted by local agreements, which were embodied in instruments in writing, if such local agreements are in existence, I think they should be introduced.

By Mr. Stuart: There was not any necessity for a local agreement to adopt this basic and district agreement.

By Mr. Richardson: We will give your Honor what we have and that will give the whole story, I think. The agreement that has been introduced here between Mr. Van Bittner and Mr. George W. St. Clair, which they made in 1933, was one of the local agreements to which you refer, Mr. Rogers.

By Mr. Rogers: That does not adopt any basic agreement. I shall read it, inasmuch as the Court didn't see it. It says:

"It is understood that your mines are in the Pocahontas Tug River coal field and the loading rates are 35.7¢ per ton. It is agreed between us that the Jewell Ridge Coal Corporation will increase the rates now be-

ing paid by it for dead work 20%. The rates for dead work in the Pocahontas-Tug River field shall not apply to your mines.

[fol. 65] "It is further agreed that the cutting rate with the shortwall machine shall be increased to 6½¢ per ton and that the cutting rate with the arcwall machine shall be 70% of 6½¢ if done by piece work.

"It is distinctly understood this agreement set no precedent for the establishment of future wage rates for dead work.

"This agreement is made in the spirit of fairness with the knowledge that collective bargaining must always be on a basis of constructive co-operation between the company and the United Mine Workers of America."

I don't see where this adopts a previous agreement, or has any connection whatever with a basic agreement, and therefore, as between the parties here, I don't think these past agreements introduced prior to this Exhibit No. 5 have any bearing on this case.

By the Court: The witness testified that the mines operated under agreements embodied in certain printed documents. If they were adopted by local written agreements, let those local written agreements be introduced. If they weren't, let him go ahead and testify that they were adopted.

By Mr. Richardson:

Q. 94. Was there any written agreement between your company and anybody, expressly adopting in so many words these agreements which have been filed in evidence?

A. There were, but may I go back to the beginning to briefly explain this?

By the Court: Yes, sir, go ahead.

A. In 1933, all of the mines of the Smokeless Field became unionized and entered into a contract with the United Mine Workers of America. That was in this District 17, known as the Pocahontas-Tug River Field, and the other fields were the New River, Winding Gulf, and Greenbrier. A question had arisen whether our mine belonged in District 17 or District 28. This letter was written to clear up that situation, stating that our mine was located in the

Pocahontas-Tug River Coal Field, with the understanding [fol. 66] that by doing so, that we worked under the Pocahontas-Tug River Agreement, or the Smokeless Wage Agreement. That was not set forth in this letter. At the time it was clearly understood,—

Q. 95. By "this letter," you mean Exhibit No. 5?

A. Exhibit 5. That was clearly set forth in agreements, which were merely a ratification of the Appalachian or Smokeless agreements that were later made, with our local agreement on certain rates that applied only to our mine.

Q. 96. This letter, Exhibit No. 5, is signed "Van A. Bittner." Who was he, if you please, and what position did he hold at that time?

A. He was President of District 17, United Mine Workers of America.

Q. 97. And District 17 included the Pocahontas and Tug River fields?

A. Yes, it did.

Q. 98. Here is a letter, Dr. St. Clair, addressed by Jesse Aquino, under date of April 22nd, 1937, to you, as Vice-President of Jewell Ridge Coal Corporation, and attached to that a letter to Mr. Aquino, dated April 15, 1937, and signed by Jewell Ridge Coal Corporation, by yourself, the paper being also signed in the name of Van A. Bittner, President, W. M. Blizzard, Vice-President, Jesse Aquino and William Lester, and I will ask you if that is an agreement, or if that correspondence makes an agreement in respect to the contracts in evidence?

A. Yes, this does.

By Mr. Richardson: We offer this correspondence in evidence. Is there any objection?

By Mr. Rogers: No, sir, none other than our general objection to all of this.

By the Court: Let the documents be received under the same conditions as the previous documents.

[fol. 67] The papers referred to were thereupon filed, bound together, marked as "Plaintiff's Exhibit No. 11", and returned as a part of this transcript.

Q. 99. Dr. St. Clair, here is an agreement between Jewell Ridge Coal Corporation, by yourself, as vice-president, and United Mine Workers of America, signed by Van A. Bittner and William Blizzard and others, and I will ask you if that is a copy of an agreement that was made be-

tween your company and the Union, in respect to these general and district agreements that have been introduced in evidence?

By Mr. Rogers: What date is that?

By Mr. Richardson: I didn't give the date because it is not clear.

A. It is effective September 16, 1937, until March 31, 1939. It is an agreement between the United Mine Workers of America and the Jewell Ridge Coal Corporation to apply at the Jewell Valley mine. May I read the paragraph to which you refer?—"The Agreement known as the Pocahontas-Tug River Agreements and entitled Appalachian and Pocahontas-Tug River Agreements by and between Pocahontas Operators Association and the United Mine Workers of America, District 17, and the International Union, effective April 1, 1937, until March 31, 1939, inclusive, apply at the Jewell Valley Mine, with the following exceptions only:", those exceptions being differences in rates for application at that mine.

The agreement referred to was thereupon offered in evidence by counsel for the plaintiff, and was admitted by the Court under the same circumstances and upon the same conditions as other documents previously offered, and the same was thereupon filed, marked as: "Plaintiff's Exhibit No. 12", and is returned as a part of this transcript.

[fol. 68] Q. 100. The agreement you have just identified and filed in evidence related to the Jewell Valley Mine. Was there a comparable agreement executed by the representatives of the United Mine Workers and your company in like effect in respect to the Jewell Ridge Mine?

A. There was, the only difference being that there are a few slight differences in rates between the two mines.

By Mr. Richardson: If Your Honor please, I am sorry I don't have that agreement. Dr. St. Clair thinks there was such but it isn't among my papers. I should like to have the privilege of supplying that if we can locate it.

By the Court: That will be all right. I will admit the evidence in regard to it with the understanding that if you can find an actual copy of the agreement, that will be introduced also.

By the Witness: May I make a statement about that?
By Mr. Richardson: Yes.

A. The working conditions embodied in the Appalachian Agreements and the Pocahontas-Tug River Agreements have always been followed because they have been understood to apply. We have settled grievances under the terms of the machinery set up in the contract. I don't believe there can be any dispute about those two contracts applying at our mines.

Q. 101. Here is an agreement, Dr. St. Clair, dated September 12, 1941, between Jewell Ridge Coal Corporation and United Mine Workers of America, relating to the Wage Agreement of April 1, 1941, as applicable to the Jewell Ridge Mine. Will you please look at that and state whether that is an original agreement that was executed between these parties, operating to make the general and District Agreement of April 1, 1941, applicable to the Jewell Ridge Mine?

A. This is the agreement that does so, yes.

By Mr. Richardson: We should like to offer this paper in evidence. I can furnish you copies of that, gentlemen.
[fol. 69] By the Court: Let the document be introduced upon the same conditions.

By Mr. Richardson: May we, if Your Honor please, supply a carbon copy in lieu of this document?

By the Court: Yes, sir, a copy may be filed and the original withdrawn.

The copy referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 13", and is returned as a part of this transcript.

Q. 102. Here is a comparable agreement, dated September 12, 1941, and operating to like effect in respect to the Jewell Valley Mine. Is that an original agreement made between these parties and to that effect?

A. Yes, this is.

By the Court: This document may be received in evidence upon the same conditions and upon substitution of a copy, the original may be withdrawn.

The copy referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 14", and is returned as a part of this transcript.

Q. 103. Doctor, were the District Agreements which are included in these printed contract forms introduced in evidence made by groups in which a representative authorized to speak for your company was one?

A. Yes.

Q. 104. And those District Agreements were thereby made applicable to and effective as to your company?

By Mr. Rogers: Objection, because it is contrary to the written agreements just filed. The written agreements just filed, which Your Honor did not read, are the Agreements between these parties—if Your Honor will look at Exhibit 14.

By the Court: The document shown me seems to make effective the agreement therein referred to between the plaintiff mine and the Union.

[fol. 70] By Mr. Stuart: With certain exceptions. The District Agreement is self-explanatory as to all parties in the District unless there is a local agreement.

By the Court: I think the objection goes more to the credibility, so to speak, than to the admissibility. I am going to overrule the objection and admit the testimony.

By Mr. Rogers: Do you have to save the point in the Federal Court?

By the Court: All you have to do is to indicate your disapproval of the Court's ruling, which you have already done.

Question No. 104, as reported, was thereupon read.

By Mr. Rogers: I don't think I made my objection entirely clear. I would like to state that our objection is based on the ground that the agreements, national, district and local, speak for themselves and require no interpretation.

By the Court: Overruled.

Question No. 104, as reported, was thereupon read.

A. The answer is yes. I don't know whether you want me to explain who our representative was.

By Mr. Richardson: That is not material, I think. If anyone is interested in knowing that, we can go into detail.

By the Court: That may be developed on cross-examination. It is not necessary to go into that now.

Q. 105. Referring to the Smokeless Wage Agreement, Exhibit No. 8, the agreement that was effective April 1, 1937 until March 31, 1939, I call your attention to this provision on Page 4: Prices and provisions of this contract shall apply to all mines in the Smokeless Producing District and in what is known now as District No. 17, operated by companies parties to this agreement. Were you, under the agreement of September 30, 1933, within that District 17 for the purpose of making these agreements?

A. Yes, we were.

[fol. 71] Q. 106. And was the agreement of 1937-1939 thereby made applicable to the mines of your company?

A. It was, but under the custom, each local company signed the agreement and it became applicable upon the signature of each local company.

Q. 107. Did each local company sign each of these general and district agreements?

A. I don't know whether they did or not. We were told by the representatives of the United Mine Workers that they did.

Q. 108. Did your company sign such an agreement?

A. Signed it as a part of that supplemental agreement.

By Mr. Richardson: If Your Honor please, that's all of the local agreements, as far as I know, that we have, and if we find any further, we should like the privilege of handing them to you to supplement this record, in response to Mr. Rogers' objection.

By the Court: All right. You will be so permitted. Go ahead.

Q. 109. Are your mines still in District 17 for the purposes of your wage contracts?

A. In so far as the provisions of the Smokeless Wage Agreement are concerned, they are.

Q. 110. I hand you a letter, Dr. St. Clair, dated January 26, 1942, written by Mr. George J. Titler, Secretary-Treasurer of District 17, United Mine Workers of America, and ask you if that is an original letter that you received from that representative of the Union?

A. This is, yes.

By Mr. Richardson: We should like to offer this letter in evidence.

By the Court: Subject to the same general objection, let the document be admitted.

[fol. 72] The letter referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 15", and is returned as a part of this transcript. Mr. Richardson thereupon read the letter.

Q. 111. Doctor, is Local Union 6167 referred to in this letter one of the Locals at your mines.

A. That is the number of the Local at the Jewell Ridge Mine.

Stipulation

It is also stipulated by counsel that Local Union No. 7327, at and before the institution of this suit, was under the jurisdiction of District No. 28.

By the Court: That Local is at the Jewell Valley Mine?

By the Witness: Yes, sir.

Q. 112. I believe you have stated that these mines, the Jewell Ridge Mine and the Jewell Valley Mine, were operated under these wage contracts which have been introduced in evidence?

A. Yes, that's correct.

Q. 113. Were payments made to the mine workers for the work they performed at these mines pursuant to those agreements?

A. Yes.

By Mr. Rogers: We want to make the same general objection as to the materiality as to payment of these wages made pursuant to these contracts.

By the Court: Why not let your objection refer to all testimony in regard to all the contracts?

By Mr. Rogers: Thank you. We adopt that suggestion.

By the Court: Overruled. Go ahead.

Q. 114. Was payment made on the basis provided in the applicable contract?

[fol. 73] By Mr. Rogers: It will be considered that our same objection applies to all this line of questions?

By the Court: Definitely.

A. Yes.

Q. 115. How frequently did you pay?

A. Twice a month.

Q. 116. Just what method or means of payment was used?

A. We paid in cash the amount due the employe, which amount was the total earnings less deductions that had accumulated against his account.

Q. 117. Was a statement furnished the employe along with his pay?

A. The money was put into a pay envelope and the face of the pay envelope is a statement which shows the employe's account for the period for which he is paid.

Q. 118. And that system has been used throughout the period that you have covered in your testimony here from 1933 to now?

A. Yes, sir.

Q. 119. Do the statements to which you have referred show the number of hours for which the men are paid?

A. It shows the number of hours for those men that are paid by the hour.

Q. 120. Thereby making it clear for just what time the men are receiving payment at their successive paydays?

A. Yes, sir.

Q. 121. Have you at any time within that period paid any of the mine workers for the time consumed in traveling from the portal entrance to their usual working places and return?

A. No, sir.

[fol. 74] Q. 122. Has any of that travel time ever appeared in the statements of work time for which the men were paid?

A. No.

Q. 123. On the contrary, did the statements and payment of wages to the men from time to time show the working time as between the time employed at the usual working places within the mine?

A. The statements merely have the number of hours worked. It doesn't show where it is worked. It has the number of hours worked on the face of the statement.

Q. 124. I am asking if the number of hours was computed on the face to face basis or whether that included at any time any of the travel time.

A. It was always computed on the face to face basis.

Q. 125. Were these payments received and accepted by your employes from time to time?

A. They were.

Q. 126. Did you ever at any time have any protest or demand from any one of your employes for pay for the time consumed in traveling from the portal to the usual working place and return?

A. We have never had protests for that purpose, no.

Q. 127. Did you ever hear any question of that kind raised by any one of the employes at either one of these mines during the life of either one of the contracts which you have filed in evidence?

A. I did not, no.

Q. 128. When is the first time you ever heard of any question being raised as to pay for that travel time?

A. It was—the first time I ever heard of any demand being made for it was in March of this year.

Q. 129. And, for what it may be worth, I wish you would please tell the Court just what you heard at that time.

[fol. 75] A. When the Wage Conferences were in progress, beginning in March of this year, one of the demands of the United Mine Workers was for payment of portal to portal pay or for travel time. They made a demand—the first demand was for $2.00 a day increase in wages, basic wage. It was stated during that conference that to meet the requirements of the law, travel time should be paid for. That's the first time that I have any knowledge of any demand being made for payment for travel time.

Q. 130. And was it pursuant to that demand and its repercussions that you came to the conclusion to institute this action?

A. It was.

Q. 131. As a practical matter, I wish you would state some of the difficulties that would be encountered in shifting from a face to face basis of determining the work-day and putting the inside mine workers' pay on the basis which would contemplate payment for this travel time?

By Col. Harris: I object to the question as being wholly immaterial.

By the Court: Overruled. Exception noted.

A. Well, there are difficulties that are inherent to mining because of the constant change of the length of the travel time within districts and within mines, and even within the time of any one employe within the mine. Working places inside the mine are not fixed places of work, but they changed from day to day. When a coal miner works in a room,

he advances that room every day that he works, the distance continually increases slightly from day to day. If he is working on the extraction of pillars, which is a retreat after the rooms have been driven up, he continually shortens his travel distance. That variation would create a constantly changing period of work time, productive work time of the employe and that would be multiplied by the number of employes in the mine. When a mine first opens up, there [fol. 76] is no particular problem of travel because the distance is so short. As the mine is developed and coal is produced, the distance increases until the problem requires the transportation of men and mantrips, as evidence of the distance that has been increased in the workings. The agreements providing face to face pay have recognized the impracticability of paying on any other basis because there would be a great difference between the cost between mines and between districts, which would upset the whole market picture, because the consumers of coal can't take into recognition the variations that would come about through payment for travel time. It would create a chaotic condition for the operators and would result in quite a shift in the tonnage into various markets from different districts and mines. From the standpoint of being able to figure out what each man is entitled to, particularly the piece-workers, it would become very difficult, if not almost impossible, and this difficulty is exemplified by the fact that it has produced a temporary chaotic condition in the mines and we don't know how long that will last.

By the Court:

Q. 132. You have indicated that you pay some of your operators on an hourly basis and some on a piece-work basis. I will be glad if you will elaborate on that.

A. The coal miners, who are designated as coal loaders, who actually work at the place where coal is produced, are paid on a piece-work basis, so much a ton, and the men who run the cutting machines and their helpers are paid usually on a piece basis of so much per ton. The work performed by a coal miner is paid for at a fixed rate per ton, which includes all the work he does at his working place, which includes timbering and handling and drilling and shooting his coal. It's a rate to include all those things that he does [fol. 77] in his day's work at his working place, and it has taken into recognition all the factors that go into his employ-

ment. That has always been—well, it's been since 1934, seven hours at the face with payment per ton for each ton that he has loaded out with his check number during that seven hour period.

By Mr. Richardson:

Q. 133. And then the others who are not paid on a piece work basis, explain to the Court who they are and what they do?

A. The machine crews, who are paid on a piece work basis, undercut the coal in our mines. In some of the mines, they cut in a different level in a number of different miners' working places. They are paid a lesser rate per ton, but that rate was figured to compensate them for all the work they do on the section in which they cut the coal.

By the Court:

Q. 134. What do they do that doesn't directly produce coal?

A. Well, when they travel from one working place to another, they are not directly producing coal, but merely going to a place where they can undercut the coal for another coal miner.

By Mr. Richardson:

Q. 135. And then you have men in the mines who are paid on an hourly basis for the time they work?

A. Then we have other men who work as track men in the sections. The track men assist in some of the roof control, the timbering for the roof, lay the track, and do whatever work is necessary to make the haulage roads and other conditions suitable for the production of coal.

Q. 136. They are the so-called company men?

A. They are the company men, paid by the hour for the work they perform at their usual working places. There are other company men— I suppose you want in detail——

[fol. 78] By the Court: I would like some detail.

A. There are main line track men whose job is to lay track and keep the main line track in good condition, which is the track from the tipple on the inside to the last section. The tipple is the point at which the coal is dumped from the mine car through the preparation plant, getting the coal screened into different sizes and prepared for market,

and also into the railroad cars. The main line track goes from that point back in the mine until it reaches the last section of the mine. It requires a crew of men to take care of that track. There are pumpers who look after the pumps located for the control of water in the mines, where there is water that doesn't have natural drainage and accumulates and must be pumped. There are brattice men, who care for the ventilation, the breakthroughs have to be stopped so as to get the proper circulation of air through the working places, and that has to be built, either out of permanent material such as brick or cinder block, or temporary material, such as wood, and the most temporary material is brattice cloth. There are other men who work by the hour, who drill and shoot and load rock that is necessary to be removed either because a fault has occurred that requires a tunnel in rock, or because height is necessary for main line haulage or for other purposes, such as the loading point or the dispatcher's office. There is a dispatcher who is a trip dispatcher, the same as on the railroad, who is ordinarily located inside the mine, and he is paid by the hour, and the foremen and other men. Some are paid by the hour and some are paid a salary by the month. Is that the type of information you wanted?

By the Court: Yes, sir.

By Mr. Richardson: We will go somewhat further into that when Mr. Hagy, the superintendent, testifies and give you more detail.

[fol. 79] By Mr. Richardson:

Q. 137. You referred in your answer to the question in reference to a piece-worker about taking into account in determining the piece rate of pay the various factors entering into their service. Is that true in respect to all of these employes?

By Col. Harris: If he means, if the Court pleases, to inquire as to what entered into their minds in fixing the rate of pay, we object to it because the contracts are written instruments and all prior negotiations and factors are merged in the written instruments and for him to say what went into it is a pure conclusion, and furthermore, if he means by that to imply, without directly asking the ques-

tion, that travel time was taken into account, the testimony of the witness has been that travel time was not taken into account, and he went into an explanation that you couldn't take it into account because it would upset the market, so we think his conclusions as to the factors is purely inadmissible.

By the Court: I overrule the objection. Let an exception be noted.

Question No. 137, as reported, was thereupon read.

A. Yes, the tonnage rate to which I believe you refer for the coal loader was set at a figure to cover all of the factors incident to his employment.

Q. 138. And was that true as to the agreed rate of pay for the specified services to be performed by all the various workmen?

Counsel for the defendants interposed the same objection as previously noted.

By the Court: Overruled.

A. Yes, sir.

Q. 139. Was the necessity of traveling into the mines to the usual working place one of the factors which was included in the determination of these rates, if you know?

A. Yes, it was a factor that was well known to everyone involved in the discussions resulting in final wage agreements, and the rate was determined upon as a practical and [fol. 80] proper method of payment for work performed by the employe.

Q. 140. Then, if I understand you, when you said that no payment has been made to your employes under these contracts for travel time, you meant no payments for travel time as such?

A. That's right.

Q. 141. But if I understand you correctly, the travel time was taken into account as a factor in determining the rates of pay preserved in these contracts and actually paid to your employes?

A. That's right.

Cross-examination.

By Senator Muse:

Q. 1. Dr. St. Clair, I believe in your two mines, the Jewell Ridge, I will refer to, you have what is known as sections in the mines?

A. That's right.

Q. 2. Tell me the number of sections and name them, that are in the Jewell Ridge Mine?

A. I don't believe I can do it without reference to the records.

By Mr. Richardson: May I say, as to the details of the mines and the mining operations, Mr. Hagy will testify and will show all of the locations. I have no objection to the question but there are some of the details as to which Dr. St. Clair may not be informed.

By Senator Muse: That being true, I will confine my questions to him within a compass I think it necessary.

By the Court: I think to interrogate the president of the mine about details which in all likelihood he would not be familiar with would not serve any useful purpose.

By Senator Muse: The travel time he spoke of, he testified about that and I want to cross examine him.

[fol. 81] Q. 3. Doctor, you are not able to state to us correctly the number of sections in either the Jewell Ridge or the Jewel Valley Mines, are you?

A. I know the mines and I know the sections, but I wouldn't like to state specific answers in regard to that.

Q. 4. Are you able to state the distance from the portal at Jewell Ridge back to the various sections?

A. It varies from approximately five thousand feet to approximately twenty-five thousand feet.

Q. 5. Twenty-five thousand feet is about five miles?

A. A little less than five miles.

Q. 6. How about Jewell Valley?

A. It varies there up to approximately twenty or twenty-one thousand feet. It's a little less than Jewell Ridge.

Q. 7. What is the height of the roof of the rail haulage ways at Jewell Ridge?

A. The minimum height is about forty-nine inches from the rail.

Q. 8. Forty-nine inches from the rail?

A. Yes, sir.

Q. 9. Now, do you know the height of the haulage ways back to the various sections after you branch off the main haulage way?

A. I don't know that in detail. It varies considerably.

Q. 10. It is of such a height that a person of average height would have to stoop over in order to walk it, wouldn't he?

A. In some cases he would; in most cases, he would.

Q. 11. Is that also true as to Jewell Valley?

A. Yes.

Q. 12. It is even more pronounced at Jewell Valley, isn't it?

[fol. 82] A. The average height at Jewell Ridge is higher than at Jewell Valley.

Q. 13. What's the average height of the coal seam at Jewell Ridge?

A. The height of the roof, you mean?

Q. 14. Yes.

A. The average height is approximately fifty inches. That doesn't mean the coal is that thick but there is other material comes with the coal.

Q. 15. What's the depth of the seam at Jewell Ridge?

A. Possibly forty-six inches.

Q. 16. How about Jewell Valley?

A. It's lower, about forty to forty-one inches is an average height.

Q. 17. At Jewell Ridge there is a man-station for each section where the men work, is there not?

A. Yes,—a man-trip station, you mean?

Q. 18. Yes, man-trip station?

A. Yes.

Q. 19. When a coal loader reaches a man-trip station, he walks then to his particular room he is working in, does he not?

A. Yes.

Q. 20. That some times goes up as high as a thousand feet or more, doesn't it?

A. Yes.

Q. 21. Now, Doctor, in your direct examination you testified about these man trips. How long would it take a miner at Jewell Ridge to walk from the portal at Jewell Ridge Mine back to the farthest section?

[fol. 83] A. I don't know. It's between four and a half and four and three-quarter miles.

Q. 22. He would have to walk most of that distance in a stooped over position, would he not?

A. Some of it, he would. Most of it, he wouldn't.

Q. 23. Do you know what proportion he would have to walk stooped over?

A. No, I don't know that.

Q. 24. Is there any walkway provided from the portal at the Jewell Ridge Mine back to the various sections for men to walk on,—the miners?

A. There is a clearance beside the main line track, which is merely a space between the track and the coal rib or coal side.

Q. 25. How much is that clearance, Doctor, do you know?

A. When you ask that, do I properly assume that you mean the minimum clearance?

Q. 26. Yes.

A. I don't know. I haven't walked through there——

Q. 27. You haven't walked through there for a long time?

A. I know what it is supposed to be, but I don't know what it is.

Q. 28. There is provided in neither of these mines a walkway for the men to walk in the mines, is there?

A. What do you mean by a walkway?

Q. 29. No preparation made for a space for the men to walk in?

A. Nothing except the clearance between the track and the coal.

Q. 30. And they have to walk over such obstructions as might be on the floor, such as slate or coal or water or anything else that might be there?

[fol. 84] A. If they travel there, if there is any obstruction there, they would have to walk over it.

Q. 31. Do you expect your employes to walk into that mine or ride that mantrip?

A. Well, they may do either. We expect them to ride the man-trip because most of them want to do it.

Q. 32. Do you want them to do it?

A. Yes. There is some advantage to the company and some advantage to the men.

Q. 33. A man working in either of those mines, back this several thousand feet, it would take him some time to make that walk, wouldn't it?

A. Yes, sir.

Q. 34. When he finished the day's work, it would take him some time to get out?

A. It would take longer than going on the man trip.

Q. 35. And when he was walking, he would be constantly in danger of being struck by the haulage, wouldn't he?

A. There is always the possibility of being struck by a trip.

Q. 36. How many men are employed at Jewell Ridge, approximately?

A. Approximately five hundred.

Q. 37. How many at Jewell Valley?

A. Approximately four hundred.

Q. 38. Of these five hundred men—of that number how many, approximately, go in the mines daily?

A. Somewhere around eighty to eighty-five per cent; I will say eighty-five.

Q. 39. If the four hundred men who go into the mine at Jewell Ridge walked in instead of riding, wouldn't it slow [Tol. 85] up the production of coal considerably at Jewell Ridge?

A. It wouldn't be as orderly as going in the man-trips.

Q. 40. How about the quantity of coal produced?

A. The men, I think, would expend more energy walking than riding. I think they would possibly produce less.

Q. 41. These four hundred men walking into that particular mine, would that interfere with the movement of the empties into the mine and the loaded cars out of the mine, to have four hundred men walking in that mine?

A. It's a hypothetical question. We don't have four hundred men walking there.

Q. 42. You have been in the coal business a long time. What do you think would be the result?

A. I think it would interfere to some extent.

Q. 43. How long have you been running the man-trips, Doctor?

A. I don't know. That sort of gradually evolved and they have been running since before my last connection with the Company in 1932.

Q. 44. If you expected these men to walk into the mines instead of riding the man-trips, you would make some travel way for them to walk on, wouldn't you?

A. I don't know of any mine that has done that. A lot of mines, they do walk in, where they are new and don't have a great deal of distance to go.

Q. 45. Do you know of any mines where they walk in a distance of four or five miles?

A. Where all the men walk in?

Q. 46. Yes.

A. No.

[fol. 86] Q. 47. It is customary in the District in which you are located to have man-trips, isn't it?

A. That's right.

Q. 48. Doctor, these contracts you have referred to here as the basic contracts,—in every instance you have executed a supplemental contract with the Local Union, haven't you?

A. That's right.

Q. 49. In fact they do not become effective until they are signed by the Local Union, do they, the basic contracts?

A. We have started to work with the understanding that our local agreement and the Appalachian or Southern or Smokeless Agreements would apply to the period. It was a matter of a few days, usually.

Q. 50. You began to work under the District Agreement, but you actually have your supplemental agreement or you know you are going to have it?

A. We actually go back to work with the understanding that we will sign the supplemental agreement.

Q. 51. I believe the last contract you signed, supplemental agreement, was to the basic contract from April 1, 1941, to April 1, 1943?

A. That's right.

Q. 52. That's the last supplemental contract you have signed, is it not?

A. That's right.

Q. 53. That's the last contract of any kind that you have signed?

A. That's right.

Q. 54. Dealing with your employee relations. Now, Doctor, you stated also that in fixing the wage rates of these men, that portal time was considered. Were you in the Wage Conference in 1941?

[fol. 87] A. No, I was not.

Q. 55. Which resulted in the contract that I have just referred to as expiring April 1, 1943?

A. No, I was not. You are speaking of the Southern Wage Conference?

Q. 56. Yes.

A. No.

Q. 57. How do you know then that the factor of travel time was considered in fixing the basic rate of pay?

A. Because all who were present in that conference were familiar with the conditions under which the miner works and the rate of pay was fixed on a face to face basis to compensate him for all the work he performed.

Q. 58. You, however, were not at that conference?

A. No.

Q. 59. Are you basing that on hearsay or your idea of what occurred?

A. I base it on knowing the men present at that conference and on the contract itself.

Q. 60. The contract itself, which speaks for itself, specifically provides for the rate of pay for the coal loaders at face to face, doesn't it?

A. That's right.

Q. 61. As to the other men, it is their customary working place?

A. I would want to refresh my memory before I would answer specifically what the contract said.

Q. 62. I am talking about the effect of it. That's your recollection, isn't it?

A. Yes.

[fol. 88] Q. 63. This last contract you signed, which expired on April 1, 1943, is absolutely silent as to travel time, isn't it?

A. Would you mind repeating that question?

Question No. 63, as reported, was thereupon read.

A. The contract that was made in 1941, to March 31st, 1943,——

Q. 64. That's the one I am referring to.

A. Has no provision for payment for travel time.

Q. 65. It is silent as to travel time, isn't it.

A. It is silent in that it makes no statement as to travel time.

Q. 66. Does the expression "travel time" appear in that contract?

A. I don't remember that it does.

Q. 67. You certainly don't remember that it does, do you, Doctor?

A. No.

Q. 68. You went into a discussion of the difficulties if these men were paid for travel time. If these men were paid from the time they enter the portal of the mine until they get back, with allowance for lunch time, it would easily solve the problem, wouldn't it?

A. You say if they were paid?

Q. 69. Yes, if you paid them from the time they enter the mine until the time they come out, it would be a very easy calculation, wouldn't it?

A. It would be a very difficult calculation.

Q. 70. You know what time your cars go into the mine, don't you, on man-trips?

A. Do you mean now the piece workers would be changed to an hourly basis?

Q. 71. Now, I am dealing right now with the—I mean this, with proper allowance made for your piece workers, if you [fol. 89] calculate the time when your man-trips enter the portal and the time they come out at the end of the day's work, it would be no serious problem, would it?

A. It would be no problem to determine the time the men were in the mines, but it would be extremely difficult to work out an equitable payment for piece workers.

Q. 72. It would certainly be a simple thing to determine how long a man stayed in your mine?

A. That would be simple, but that isn't the problem.

Q. 73. If you paid them for all the time they were in that mine, it wouldn't be very difficult, would it?

A. It has a good many difficulties in it.

Q. 74. Doctor, you have testified that in fixing these rates of pay, that travel time was a factor considered and included in the rate of pay. If that is true, is it not true that you pay all the men in the same classification the same rate of pay, irrespective of how far they travel?

A. Do you mean by that we pay all the coal loaders the same rate per ton?

Q. 75. Yes.

A. Yes, that's true.

Q. 76. That's true, irrespective of whether they travel for half a mile or five miles, isn't it?

A. That's correct.

Q. 77. You pay the same basic rate in your mines that is paid in the other mines in District No. 28?

A. No, we pay the basic rate paid in District 17.

Q. 78. In District 17. In other words, your men in the same classification get the same rate of pay as the other mines in District 17?

[fol. 90] A. Basic rate. There are some exceptions here that have been filed in these exhibits.

Q. 79. I am talking about the basic rate?

A. Yes.

Q. 80. The travel time in different mines, of course, varies according to the mine?

A. Yes sir.

Q. 81. A mine that has just been opened, the travel time is very short, and a mine opened for a number of years, it may be very great?

A. That's right.

Q. 82. Was any allowance made in the basic rate and in the basic contract for the variation in travel time as between different mines?

A. No.

Q. 83. So that even in your mine, the men in the same classifications get the same rate of pay, no matter how far they travel?

A. That's true, but that doesn't mean that the man who has the longest travel time will always have the longest travel time.

Q. 84. I just don't understand your statement.

A. A man may work out his room in one section and be moved to another section and have a different travel time.

Q. 85. Generally speaking, when a man works in one section, he continues to work there for a long period of time?

A. Generally for a considerable period, yes.

Q. 86. One, two or three years?

A. He may, yes.

Q. 87. Take in one section of your Jewell Ridge Mine called Parallel,—I was back in there,—that's a long way from the portal, isn't it?

[fol. 91] A. Yes, that's the longest distance we have, as a matter of fact.

Q. 88. That's several miles at least, isn't it, Doctor?

A. About four and a half miles,—about twenty-five thousand feet.

Q. 89. The man who works back in the Parallel Section some four and one-half miles from the portal, has the same basic rate of pay as a man who has been working for a year or two in one of the closer sections, probably half a mile from the portal?

A. That's right.

Q. 90. If the travel time was a factor, why does a man who travels four miles in your mine get the same basic rate of pay as a man who travels only half a mile?

A. Because in the judgment of the United Mine Workers and the operators in conference, after years of negotiation, there was no method that they could find that would be as equitable and fair over a period of time as the one that has been worked out in this agreement. The impracticability of paying for travel time has never been solved, so that it could be set forth in an agreement, without bringing about a rather chaotic condition in the industry.

Q. 91. Do the outside men get the same basic rate of pay?

A. They get a lower rate.

Q. 92. Do you have men on the outside who do comparable work to those on the inside?

A. In the expenditure of energy?

Q. 93. No, the classification of work—blacksmiths, for instance?

A. We have some similar men, if that's what you mean.

Q. 94. When I say classification, I mean whatever it is,—do you have men on the outside that might have the same classification as men on the inside?

[fol. 92] A. You mean whether the contract designates a classification which applies to both inside and outside men?

Q. 95. No. Do you have men on the outside working in certain classifications and also have men in that same classification working on the inside?

A. I never thought of it that way.

Q. 96. I'll tell you what I have in mind. I am of opinion that the men on the outside have a different classification as to type of work than the men on the inside.

A. Their work generally is different.

Q. 97. You haven't got anybody at either one of these mines who is doing on the outside the same type of work that is done on the inside, have you, except laying track?

A. Well, track work.

Q. 98. And those same track men who work on the outside of the mine work inside your mine?

A. You have inherently different conditions inside than you have outside.

Q. 99. You talked about men on the outside getting a different rate of pay from the men on the inside. Name me some men outside, or classification outside, who are getting a less rate of pay than the same classification on the inside.

A. May I refer to one of these contracts?

Q. 100. Certainly.

A. We have a dumper inside at 80¢, and a dumper outside at 69.1¢.

Q. 101. What does that dumper do inside?

A. We don't have any inside dumpers inside our mines, [fol. 93] but I assume that's in shaft operation, where he dumps the mine cars.

Q. 102. That's in a shaft operation?

A. That's my understanding.

Q. 103. Take the schedule there in so far as your two mines are concerned, and give me a classification where men on the outside get less than the men on the inside.

A. The only difference that I see here is the designation of all other—You have got a list here of various classifications and at the end, there is a designation of other inside labor, 76.6¢,—that's inside. Outside is common, able-bodied outside labor 65.7¢.

Q. 104. That's as far as looking at your schedule is concerned, the only classification that would seem to be similar outside and inside is common labor?

A. Well, the dumpers.

Q. 105. You don't have any dumpers inside?

A. No, we don't have any dumpers inside.

Q. 106. The common laborer on the outside does what?

A. Well, he does the common labor that's incidental to construction, maintenance.

Q. 107. Is it more dangerous to work inside that mine than to work outside of it?

A. It depends on the job that is being done at either place.

Q. 108. Generally speaking, when you enter that portal and get inside that mine under that mountain, you are in a more dangerous situation than you are outside where the sun can shine on you?

A. I think generally that might be true.

Q. 109. Mines have never been considered the safest place in the world to work, have they?

[fol. 94] A. No, but they have never been properly represented to the public, either.

Q. 110. Anyway, these laborers inside, they help to put up these timbers holding the roof?

A. That's right.

Q. 111. That's a pretty dangerous job, isn't it to put up those timbers to hold the roof?

A. Awfully dangerous some time, if you don't put it up.

Q. 112. It is very dangerous while you are putting it up?

A. There are instances where it is dangerous.

Q. 113. That roof can naturally fall down on a man's head,—that's a possibility, isn't it?

A. Yes, but when a roof is that dangerous, they don't put the timbers up, they take the roof down.

Q. 114. That's what you expect them to do, but sometimes these roofs fall without any preliminary warning?

A. That happens some times.

Q. 115. A common laborer inside the mine is more likely to get run over by one of those trams than he is outside, isn't he?

A. By one of those trams,—yes.

Q. 116. You take a track man, he works inside and outside, doesn't he,—depends upon where he has track to lay?

A. Yes.

Q. 117. If he works outside the mine for a month, do you pay him the same basic rate of pay that you pay him if he works inside the mine that length of time?

A. It used to be—I am not certain now, that your outside gang or your slate dump crew or some other group did [fol. 95] the outside work on the track. To what extent that is done now, I don't know.

Q. 118. You heard a great deal, Doctor, about travel time in the Wage Conference that took place in March, 1943, didn't you?

A. Yes, sir.

Q. 119. You were not present, however, at that conference?

A. No.

Q. 120. But you know there were demands made by the Union for travel time at that conference?

A. That's correct.

Q. 121. In other words, all the news papers carried it?

A. The newspapers carried it, and the Association of which we are a member advised us.

Q. 122. Mr. Burke saw to it that you were kept advised of that negotiation, I take it?

A. That's right.

Q. 123. Do you happen to know, Doctor, whether that conference began on March 19th? I don't know. I understand that's the date.

By Senator Burke: March 10th.

By Senator Must: Can we agree that that conference began on March 10th, 1943.

By Mr. Richardson: Yes, sir, whatever the correct date was.

By Mr. Stuart: The Northern began on March 10th and the Southern began two days later, March 12th.

Q. 124. Do you know, Doctor, whether written demands were made by the Union on March 10th, at one of the Wage Conferences, asserting the contention that under the Wage and Hour Law, that travel time was work time within the meaning of that Act?

A. I don't remember at the moment whether it was writ-[fol. 96] ten or not. I understand that demand was made. I believe it was written, but I don't know whether it was or not.

Re-direct examination.

By Mr. Richardson:

Q. 1. Doctor, in answer to some question in your direct examination you referred to a confusion existing in the determination of present rates. How long has that continued,—how long has that been, the confusion to which you referred?

A. There has been confusion ever since the Secretary of the Interior and Mr. Lewis agreed on provisions requiring payment for travel time.

Q. 2. That was under the arrangement that was made on November 3rd, 1943?

A. Yes.

Q. 3. And it was from that and to that that you referred to this confusion?

A. Yes. There was an uncertainty prior to that time what the final rates would be. The confusion to which I referred began with the provision requiring the payment for travel time.

Q. 4. By the way, Doctor, are you presently operating these mines as a representative of the United States Government?

A. Yes.

Q. 5. The Jewell Ridge Coal Corporation is not at this time operating these mines?

A. That's right. I have been designated as Operating Manager for the mines of the Jewell Ridge Coal Corporation.

Q. 6. Have the coals produced from these mines been sold in the markets generally throughout the time you have been connected with it?

[fol. 97] A. It has been sold in the markets in which coal in the Southern Field is generally sold.

Q. 7. They are what is known as commercial mines?

A. That's right.

Q. 8. Give me some idea of the proportion of the producing cost represented by the labor going into the production of coal?

A. Well, the labor cost generally is in the neighborhood of two-thirds of the total cost.

Q. 9. And have the selling prices of this coal throughout your experience with the mines been predicated upon cost determination on this face to face basis of production?

A. They have, yes.

Q. 10. You were asked certain questions as to whether or not payment for all of the time elapsing from the time the inside worker entered until he emerged from the portal would make it easy to dispose of the problem. What would you say as to the problem of selling commercial coal, the established price of which is based, as you have stated, on this face to face labor problem?

The defendants, by counsel, objected to the foregoing question, which objection the Court overruled.

A. I have just stated in reply to your question that the selling prices were based on the cost which we experienced during the face to face method of payment. If we go to the payment of travel time, it would materially increase our cost, but it may not increase our competitor's cost to

the same extent. It may be less or more. One of the difficulties in payment of travel time may be exemplified by the coal miner who would go in there and load one car. We have some men who do load one car and come out, and if we were to pay them for that car the tonnage rate plus [fol. 98] travel time, in and out, the cost of that coal he loaded would be exorbitantly high, much higher than the man who went in and loaded five cars, because we would have five cars to distribute that travel time over instead of one. That's just one of the problems that come up in this payment for travel time.

Q. 11. Is there a problem competitive in character that is neeessarily present as between mines having a longer travel distance and those having a shorter travel distance. I mean, on the average, is there a competitive difficulty that would result from a shift from a face to face basis of pay to the portal to portal basis if pay?

A. It would disrupt the relative costs between mines and districts and cause a shift of tonnage in the markets. Is that what you mean?

Q. 12. Yes. You say it would disrupt it. Drawing upon your experience in selling coal, what effect would it have upon those mines which have the longer travel time?

A. The mines that have the longer travel time would be put at a competitive disadvantage because their cost would be higher and they would have to find some means to place their coal at a higher cost than other mines, or have a disadvantage by having to reduce the margin on which they operate. They would have a competitive disadvantage in the amount that the travel time cost them more than it cost their competitor.

Q. 13. Doctor, when coal was being sold on a competitive basis, I mean before the stimulus of war demand was felt in the markets, state whether or not a difference in price of a few cents per ton made the difference in a sale?

A. Yes, in many cases it did. In some cases, one cent a ton would make a difference, where coal was sold on bids, but in the general commercial market, coals of equal quality, industrial coals of equal quality, were sold to the same [fol. 99] customer at practically the same prices. Five cents difference might be the cause of losing a contract.

Q. 14. So the mine on portal to portal basis having the longer travel time would have a handicap which would

create a real obstacle in its competitive position in the market?

A. In any normal market, it would create a very definite handicap.

Q. 15. You were asked some questions as to the hazards encountered by men within the mines as compared with those outside of the mines. During the years you have worked at the mines, where do you find men prefer to work, inside or out?

A. Well, that's a hard question to answer, because the men who come to apply there know we are mining coal and most of the applicants for jobs that we have are men who expect to work underground, and who appear to prefer to work underground.

Q. 16. And that is so as to men who are entirely familiar with the conditions encountered underground?

A. That's right.

Re-cross-examination.

By Senator Muse:

Q. 1. Doctor, is it not a fact that competitive costs are affected by many varying factors, such as thickness of seam, character of roof, presence of impurities, length of haul, freight rates, etc.?

A. That is right, yes.

Q. 2. Also, coals of different grades and chemical compositions sell at different prices?

A. That's right.

[fol. 100] Q. 3. So this question of portal to portal pay or travel pay would be only one of many factors that have to now be considered by an operator?

A. Over a long period, there has been an established relationship developed between the mines operating and producing coal, some of whom were unable, because of various factors, to continue and have gone out of business, and others continue to operate, and this would bring in a new factor which would be disruptive to those who have gotten into an established market and position.

Q. 4. The factor of economic conditions has always to be considered, whether the country is demanding coal, or whether it is a drug on the market?

A. Yes, sir.

Q. 5. The factors change from time to time, do they not?

A. They do, and I was directing my other answers to what we think of but I can't define as a normal market or an average market.

Q. 6. The Government, in fixing prices in different Districts, takes into consideration the varying factors, don't they?

A. That's right.

Q. 7. You are never going to stabilize and get fixed all the factors to be considered in the price of coal, are you?

A. I should say not, from my experience.

Witness stands aside.

At this point, it being 1:00 o'clock P.M., a recess was taken until 2:00 o'clock P.M., at which time the trial of this case was resumed.

[fol. 101] J. A. Hagy, another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct-examination.

By Mr. Richardson:

Q. 1. Your name is J. A. Hagy?

A. Yes, sir.

Q. 2. Where do you live?

A. I live at Jewell Ridge, Virginia.

Q. 3. What is your profession?

A. My profession is coal mining engineer. At the present, I am superintendent.

Q. 4. What technical equipment and preparation did you have for that professional work?

A. In my days that I was in high school, during the summertime, I mean during the vacation, I worked in coal mines, worked on an engineering corps, and then I went to college and received a degree in coal mining engineering.

Q. 5. At what college?

A. VPI—Virginia Polytechnic Institute.

Q. 6. And what connection do you now have with the Jewell Ridge Coal Corporation?

A. I am superintendent of their two coal mining operations.

Q. 7. That is the Jewell Ridge operation and the Jewell Valley operation?

A. The Jewell Ridge operation and the Jewell Valley operation.

Q. 8. How long have you been superintendent of those two operations?

A. I have been superintendent since February, 1942.

[fol. 102] Q. 9. In your work as superintendent, have you been active in and about these two mines?

A. During the time that I have been superintendent, I have been in the mines probably sixty per cent of the time. I go in each mine at least once a week, and a lot of times I go in the mines, one or the other, every day during the week.

Q. 10. And all over the mines?

A. All over the mines; walk most of the distance.

Q. 11. All of the men who are employed at these mines work under your general supervision?

A. Yes, sir, all the men who are employed in the mine and around the mine and at the mine, outside at the camp in maintenance work, are all under my direction.

Q. 12. Give the Court a general idea of the location of these mines.

A. The Jewell Ridge Mine, the one we call the No. 1 Mine, is located at—the post office there is Jewell Ridge, Virginia. It's in the northwest portion of Tazewell County, about forty-five miles west of Bluefield, West Virginia. It is nine miles north, approximately, from Richlands, Virginia. Our No. 2 Mine, or Jewell Valley Mine, is about eighteen miles north of Richlands, Virginia, and about thirty-five miles east of Grundy, Virginia, that mine being in Buchanan County. However, our property, part of it, is in McDowell County, West Virginia, and about five-sixths of it, or maybe a little less, is in Buchanan County, and the remainder is in Tazewell County.

Q. 13. Is it all one body of land on which these two mines are located?

A. Yes, it's all one body of land. It's all adjoining.

Q. 14. What's the general character of that land, as to [fol. 103] whether it is hilly, mountainous, or otherwise?

A. This tract of land lies on the mountain tops, on the main dividing ridge between Dry Fork, Dismal and Middle Creeks, which empties into Clinch River, and it is very mountainous. We have deep valleys. The coal seam itself is up right high on the mountain, right high above

water level, some places two-thirds of the way to the top of the mountain, and others it is down about half way, and at others, maybe a little further, one-fourth of the way, and we have streams that run in all directions over this tract of land, some that run south, going to Clinch, and some west into Dismal, and another to Big Sandy and on to the Ohio, and some streams that run east that empty into Dry Fork; so from that I might explain, we have a lot of hollows where the outcrop is up on the hill, and we can cut out anywhere we wish for drainage or ventilation or for someone to enter.

Q. 15. What do you mean by the outcrop?

A. The outcrop, a seam of coal is practically level, and where the mountain has washed away and leaves a valley, somewhere up on the mountain side that seam of coal comes to the surface, and where that seam of coal comes to the surface, we call that an outcrop.

Q. 16. What seam of coal are you operating there?

A. We operate the Jewell Seam. That's what the seam is called locally—the Jewell Seam.

Q. 17. And what is the thickness of the seam at the two mines?

A. Normally, at the No. 1 mine, the seam thickness ranges from forty-four inches to fifty-four inches. Of course there are places where we have faults or wants. A want is a place where you are supposed to have coal and don't have it, due to some fault in the strata, the sandstone might come down and cut the coal out, and you don't have coal in those places, and generally, right beside that, the coal [fol. 104] might go up to ten feet high, but generally the coal is from forty-four to fifty-four inches at No. 1 Mine. At No. 2 Mine the coal is a little thinner, but it ranges from thirty-two to forty-four inches. Our engineers show we have an average thickness of forty-two inches at the No. 2 Mine, but that thickness varies. Our seam is a seam of coal that is a little different from the seams in West Virginia, due to the fact that we have faulty conditions. The seam lies on the north side of a big fault that goes all the way through from Pocahontas, Virginia, down into Tennessee, and our seam is wavy. Ordinarily, it is horizontal, but dips slightly to the northwest, and sometimes it may dip several percent, and we have anticlines and synclines, and dips and swags and valleys, but these don't amount to

much. They are not like you have in an anthracite seam. Our seam is classed as being level?

Q. 18. These are drift mines?

A. Yes, these two are drift mines. By a drift mine I mean the opening is on a hillside where we drive our workings in the seam of coal and they go in horizontally.

Q. 19. These workings obviously begin at the outcrop and penetrate further and further into the hill as you continue your workings?

A. That's true.

Q. 20. What is the general character of the top?

A. Our seam over there in that section has a strata that is practically level, as I mentioned before, and right over the coal is a sandy shale that ranges in thickness from nothing up to about twenty-five feet, and it varies in thickness over the entire area. Every thousand feet that thickness will vary. Above that, we have a sandstone strata. That sandstone strata is about fifteen to twenty feet, and above that we have a rotten shale that weathers badly, and all these roof conditions enter into the mine. This lower portion just over the seam, that sandy shale, will weather [fol. 105] when exposed to air. In the mine generally there is always from two inches up to about two feet of that sandy shale that comes with the mining. It might not come the very day the coal is taken out, but as it is exposed to air, in a week or two weeks, we may have to go back and take that roof and we call that draw rock. That's where the term comes from.

Q. 21. The draw rock is the slate that comes down with the shooting of the coal that you mine?

A. Yes, it has a tendency to come. However, we prevent it from coming by setting timbers and cross-collars. A cross-collar is a horizontal beam that we use with a piece under each end, and that makes a truss affair.

Q. 22. These timbers you set, do they support the entire superstructure of rock above the mined area, or do they support just the strata immediately above?

A. The purpose of all timbering is merely to support that strata above the coal, which would be called draw rock, which may range as thick as four or five feet, but generally will average around eighteen inches up to two feet.

Q. 23, Can you tell which of the rock is apt to fall?

A. Yes, an experienced miner,—by that I mean a man that's been in the mine probably six months, can handle

roof conditions very nicely, very thoroughly, and the manner they use to test this roof is by holding their hand on it and hitting it with a pick or iron bar or something, and when they do that, that roof vibrates and the miner uses his judgment as to what to do about it, as to how thick it is, whether it will pay him to take it down without timbering it, or pay him to timber it, whichever is best.

Q. 24. About the bottom, the material just under the coal, what is that?

[fol. 106] A. Right under the coal we generally have a fire clay strata which may be three or four feet thick. That fire clay will weather rather rapidly and hold moisture, but while the coal is being mined, before the air gets to it, before it absorbs any moisture, it is hard, and easy to run a cutting machine on it.

Q. 25. On this matter of supporting the roof, the miner has the advice of his foreman as to when and where to place his timbers, does he?

A. Yes, in a way, he does. The miner, when he goes in a place, a working place where he starts work, he has had ordinarily enough experience to know what to do. The foreman comes into his place as quickly as he can after the shift starts, and when he comes in, he instructs the man to do anything he hasn't already done. The miner sets his timbers and gets his machine cuttings out from under his cut and all like that until the foreman gets there. Generally, that man has had enough experience to go on with his work. However, some man who is not experienced will have to work for a period of time with someone who is experienced before he will be turned loose to look out for himself.

Q. 26. Your progress in mining is ordinarily along entries which are used for haulways and airways, are they?

A. Whenever I look at a mine map, it reminds me of a map of a town, with six or eight entries advancing ahead, which you might compare with streets in a town, on a town map, and at right angles off of that, there will be entries from which rooms are turned, and those will be at right angles, and there will be two of them and they go down three hundred feet, which will be a room length, and then there will be two more, and so on and so on, and off these cross entries the rooms turn,—that might represent alleys or something like that. I made that com-

parison to kind of give an idea of what a mine map looks like.

[fol. 107] Q. 27. Are the rooms the places where the coal is actually mined?

A. We get a certain amount of our coal from our advance work in our entries, but around probably ninety percent of our production comes from rooms and air-courses and break-throughs. What a breakthrough is—we always drive an entry, that's where the track goes, where the men generally travel, where we take all the height we need, and parallel with that, over about sixty feet, we have an air-course. What happens there, the ventilation goes up the entry and back down the air-course, and as we advance this place, about every eighty feet, we drive a cross-cut, drive an entry from the entry over to the air course, for haulage, but the main purpose is to make an opening so we can circulate the air around, and most of our tonnage comes from rooms that are driven off the entries and air-courses.

Q. 28. These entries which you refer to as comparable to streets in a city are the avenues or courses along which your travel occurs in the mine and your haulage is done.

A. That's true.

Q. 29. Tell the Court, please, the height of your entries in these two mines, Jewell Ridge first.

A. At Jewell Ridge Mine, as I mentioned before, the height is from forty-four to fifty-four inches. As we haul through——

Q. 30. Are you speaking of the minimum height?

A. Yes, I am going to explain why they get higher. As we haul through those, after the coal is extracted, the weather, the air has an effect on the draw rock, and generally that draw rock comes and gives us additional height, sometimes six or seven feet or thicker, and that gives us all that height, and other places it does not come, and we have to shoot that to clear our haulage locomotives that haul the coal from the sections to the tipple.

[fol. 108] By the Court:

Q. 31. What is the height of one of those locomotives?

A. About forty-seven inches, but we have a trolley pole on top and this goes up to a trolley wire, but you have to have a height like that for your trolley pole to work on

so he will have pull to follow the trolley wire, so you have a minimum height of at least forty-seven inches for the haulage motor, or up to maybe five or six or seven or eight feet, whatever it may be.

By Mr. Richardson:

Q. 32. The Court asked you how high is the locomotive?

A. Forty-seven inches.

Q. 33. Is that the locomotive itself?

A. Yes, sir.

Q. 34. Above the rail?

A. Yes, sir. All the distances I mentioned are above the rail.

Q. 35. Forty-seven inches above the rail takes you to the top of the locomotive or the top of the trolley?

A. No, it's the top of the locomotive, not the top of the trolley. For instance, we have a rock loader we bought the other day and put over in the Parallel, the farthest section from the drift mouth, and we took that all the way through without having to shoot any rock any where.

Q. 36. What is the minimum height of your haulage locomotives in the Jewell Ridge Mine?

A. We have to have enough height to clear those locomotives I just mentioned. That's on the main haulage. On secondary haulage, we have other locomotives that we have to have around four feet of height, four feet or over,—that's for our ten ton haulage locomotives. Over at [fol. 109] Jewell Valley, we try to maintain on our main line forty-eight inches of clearance. However, on our secondary haulage over there, we don't take any more roof than we have to but we do have to take enough to clear these fifteen ton haulage locomotives and the mine cars.

Q. 37. And your cross entries, are they of comparable height?

A. We maintain a height on our cross entries of forty-two inches above the rail. However, in the past, we haven't taken that much roof, because we have never seen that it was necessary, because we run the man-trips right up to the section where the men work, and in those low sections we run the man-trip on further than the man-station, and those miners get out at the mouth of their working places, rooms.

Q. 38. Give me some idea of the capacity, the output of these mines, if you please.

A. We have equipment at each mine to average three thousand tons a day at each mine, or we were averaging about six or seven months ago near five thousand tons a day at the two mines combined. At the present time, we are running around about thirty-six hundred and twenty-five tons a day. The reason we have that drop in tonnage is because we do not have the man power.

By Mr. Richardson: If Your Honor please, frankly I am asking a number of questions to help familiarize the Court with the details of this mine and the issues involved.

By the Court: I think your questions are all pertinent and helpful so far,—that is, pertinent to the situation the Court finds himself in, whether pertinent to the issue or not.

Q. 39. Your mines are served by what railroad?

A. Both mines are served by the Norfolk & Western Railroad. However, they are served by different branches. The Jewell Ridge Mine is served by the Norfolk & Western on the Clinch Valley Branch, which means all of our coal comes by Bluefield. The Jewell Valley Mine is served by [fol. 110] the Norfolk & Western also, but that coal goes out down by Williamson, West Virginia.

Q. 40. What highways serve the communities at these mining points?

A. We have a highway leading off one of the main highways at Claypool Hill, going to Grundy.

Q. 41. Is Claypool Hill a point on one of the thoroughfares?

A. Yes, and it passes through the town of Richlands, and at Richlands we have a paved road that goes north up to Jewell Ridge and continues on over to Dismal Creek in Buchanan County. However, the road from Jewell Ridge to Jewell Valley is rock-based, an all-weather road, but at Dismal Creek up to Jewell Valley camp, which is around two miles, it is paved. At this place where I mentioned that the rock base road goes over the mountain and down a ridge to Dismal Creek, there is another road that comes in there that is not rock-based, but it has enough rock on it to make it an all-winter road. From all those ridges we have dirt roads, practically every ridge over there as a dirt road. Over in that section, we don't have

many roads in the valleys. They are all up on the ridges, and the men who work at the mines come in in all directions by these dirt roads, rock-based roads and hard surface roads.

Q. 42. These rock based roads you have spoken of lead into a point very close to the main entrances to the mines?

A. The road coming from Richlands to Jewell Ridge is a hard-top road. It passes by our Jewell Ridge tipple and continues on up about three thousand feet, or two thousand feet, I would say.

Q. 43. Does that also pass by the main entrance to the Jewell Ridge Mine?

A. That's what I was going to get to. It passes right by the main entrance to the Jewell Ridge Mine. Over at [fol. 111] Jewell Valley, the road there goes by the tipple and on up through the camp, and the miners walk from the road on up to the drift, which is about two hundred and fifty feet difference in elevation, so the roads go to the main drift at each mine.

Q. 44. You have referred to other openings out of these mines. Are any of the other openings from the mines immediately alongside either of the paved roads?

A. As I mentioned once before, there are many openings to the outside, the outcrop openings for drainage and ventilation and for people to enter. At the No. 1 Mine we have a road that follows the main ridge, what we call the Bear Wallow Ridge, for several miles. By going out that road in automobiles and dropping over the hill to outcrop openings, a person can enter at various places over there and be at any place in the mine, I would say, in twenty to twenty-five minutes, due to all these openings in the outcrop along the country roads.

Q. 45. They are along the country roads, but if I understand, not along the side of any of the paved roads?

A. No, not along the side of any of the paved roads.

Q. 46. You referred awhile ago to the tipple. Just where is that in reference to the drift mouth or main entrance to the mine?

A. At the Jewell Ridge Mine, the tipple is something like two thousand feet down the hollow below the drift to the mine.

Q. 47. You mean the entrance to the mine?

A. I mean the main drift, that's the entrance. Over at the Jewell Valley Mine, the top of the tipple, which is the

head-house, is right in one of the drifts where people enter.

Q. 48. What is done at the tipple?

A. The tipple is a structure where the coal is dumped out of the mine cars, the mine cars are turned over or [fol. 112] turned up on their ends and the coal slides out in a hopper. That coal is transferred down the hill to an elevation where it can be loaded into railroad cars, to what we call the lower tipple. That tipple screens the coal, sizes it and treats it, gives it a dust-treating solution, the egg and the lump sizes are treated with Coal-Add, and the finer coal, the pea size and nut size and stove size, are washed and treated with calcium chloride and the coal is loaded into the railroad car according to size. Our Jewell Valley tipple has six tracks, so that we can load six grades at one time. Over at the No. 1 Tipple, we can load four grades at one time.

Q. 49. By grades, you mean size?

A. We call it grades. That's a mining term, but we mean size.

Q. 50. Is all of that done mechanically?

A. All of it is done mechanically, except at each tipple we have a Bone-picker. That's a man who sits alongside the loading boom and picks out the impurities by hand.

Q. 51. Those impurities you call bone?

A. Bone or slate.

Q. 52. You do have men who work around about that tipple?

A. Yes, we have something like around twenty-five men on each tipple, who operate the tipple.

Q. 53. You said they were mechanically operated, but you do require man-power as well, to assist in operating the tipple?

A. Yes, all the tipple is operated mechanically, electrically.

Q. 54. You have in addition to the tipple, repair shops, machine shops outside the mine, do you not?

A. Yes. At the No. 2 Mine, we have a repair shop, a mine car repair shop. We repair mining machines which cut the coal, locomotives which haul the coal, pimps, compressors, drills and such as that. All armature winding [fol. 113] and such as that is taken to our No. 1 Mine. At No. 1 Mine we have a master shop over there. We wind armatures, do all electrical work there, repair mine cars,

pumps, fans, locomotives, and everything incidental to mining.

Q. 55. You have various persons employed in and about those machine shops?

A. Yes.

Q. 56. You have referred to different kinds of equipment, motors, cutting machines, and the pumps, and so forth. Those are mechanical appliances which are used in the mine and in the mining operations?

A. That is correct.

Q. 57. They are electrically operated?

A. Yes, electrically operated.

Q. 58. How are the mines ventilated?

A. Each mine is ventilated by a series, a number of fans driven electrically. Our No. 2 Mine has three fans. One of them is on Aily's Branch,—someone might refer to that later. That produces around one hundred thousand cubic feet per minute, and we have one on one of our operating sections that we call One South, that ventilates only one section, and we have some mine workings across a hollow away from the main body, that we call Peake's Branch, and we have a fan over there. It's a good size fan. That fan makes around fifteen thousand feet of air a minute. At our No. 1 Mine, we have seven fans. Where we cut outside at those different openings, we can always put a fan in the one closest to the face, and that way, we reduce the resistance to the air and get better ventilation at the working place, so we have seven fans in our No. 1 Mine.

Q. 59. Do you have contrivances or proper channels through which the fresh air is forced by these fans?

[fol. 114] A. We do. We have air-ways provided for the air to go in through the various working places all around the working places and come back and return out another opening.

Q. 60. Is that accurately designed to provide a movement of air through every working place in the mine?

A. It is. We have a Mining Law which requires us to have a certain amount of air per man on every air circuit.

Q. 61. Do you have facilities for testing the amount of fresh air you have in there?

A. Yes, we have instruments to test how much air we have, and also have instruments to test the gas we may have in there. However, we have never found any gas yet.

Q. 62. Are those instruments sensitive and highly applicable to the use for which they are intended?

A. We use a methane detector that's manufactured by one of the mine safety appliance companies, and for a long time we had a safety inspector that inspected each place in the mine as he got to it, which would probably be six weeks or seven weeks, a Mr. Miller, and still we have another inspector that follows up the same kind of work. We have never found any gas in it. The sensitiveness of that detector is about one part in one thousand. It's even less than that, but that's accurate.

Q. 63. What can you say as to the general volume of fresh air that you force through the mine workings in these mines as compared with the minimum standards set up by law?

A. We force more air through the mine than what the law requires us to do. The secret of getting air to the working place is maintaining the stoppings,—that's a structure you build in the breakthrough to keep air from getting through it. In each breakthrough, we build what we call [fol. 115] a stopping. It's built at our mine of cinder block and take plaster and plaster it, ordinary house plaster, wood fibre, and that makes that stopping air tight, and by using those, we force the air to the face.

Q. 64. What about the volume of dust in this mine or these mines, Mr. Hagy?

A. We do not have a dust that easily gets in suspension. A miner can go in our mine over there, either one of the mines, and work all day, and he comes out and he is not as black as he would be in the average coal mine. Our dust has a tendency to have right much moisture in it, and this fire clay bottom that I mentioned before has right much moisture, and some of the moisture probably gets into the dust from that moisture that is in the floor, and we sell our coal over there to right many people down in this section of the country and we often hear someone say the reason they like our coal is because they can dump it into their basement and the dust will not get into suspension and go up in the house or on the clothes line, so I mention that to more or less explain why the dust isn't had to get in suspension.

Q. 65. Dust is encountered in all mines in greater or less quantities?

A. Yes. You have a certain amount. Right much of the dust, of course, is made from the cutting machines.

Q. 66. Where do you find the most of the dust, on the entries where the hauling is done or in the rooms where the loading is done?

A. We have more dust in the rooms, because in the entries we load all the dust out, and after we load it out, as the place is being worked, there is never any dust that amounts to anything collects back there. We have got mine cars that don't sieve out dust out of the mine cars, and we keep all the dust loaded out of the entries and haulways.

[fol. 116] Q. 67. What about the general level of temperature throughout the mine?

A. The temperature in the mine is fairly consistent the entire year. It runs somewhere between fifty eight and sixty five degrees. That's about the right temperature that a fellow would want that works hard, just about a pleasant temperature to have. Of course, if a fellow sits down and is idle, and doesn't do anything, he has a tendency to get cold, but as long as he is working, it is just exactly the temperature he would want, a very pleasant temperature.

Q. 68. At Mine No. 1, or the Jewell Ridge Mine, give me the number of outside men that you had at some time, say the first day of this month?

A. The first day of November, I had seventy-nine outside men at No. 1 Mine.

Q. 69. That included all the men who worked at the tipple and in the machine shop and in the company store?

A. I have no tabulation of all that's in the store. At the No. 1 Mine, going into detail——

Q. 70. I don't think you need to give the detail.

A. Engineering department, power house, mine foremen, superintendent, inspector, chief electrician, carpenters and all other outside men, we had one hundred and seventy-two at No. 1.

Q. 71. What date was that?

A. I am wrong,—one hundred and seventy-three.—November 1st.

Q. 72. This year?

A. Yes sir. On August 15th, we had one hundred and seventy-two.

Q. 73. How many was that?

A. On November 1st?

Q. 74. You gave another date.

[fol. 117] A. August 15th was the first one I gave.

Q. 75. How many inside men altogether on those same dates?

A. August 15th, the machine men, inside slate men, motormen, and all like that, I had a total of 192 company men.

Q. 76. How many loaders?

A. Two hundred and seventy-three, making a total of four hundred and sixty-five men inside at the No. 1 Mine.

Q. 77. Give me the same thing as to your November 1st date.

A. November 1st, I have one hundred and ninety-five company men at No. 1, and one hundred and seventy-five coal loaders, making a total of four hundred and sixty inside. Let me check that. I believe I got on the wrong line there,—coal loaders No. 1 Mine, August 15, two hundred and seventy-three. Is that right, what I gave you?

Q. 78. Yes.

A. And two hundred and sixty-five, November 1st, and at the No. 2 Mine, Company men, I have one hundred and fifty-six on August 15th.

By Mr. Stuart:

Q. 79. That's inside?

A. Yes, sir, that's inside.

By Mr. Richardson:

Q. 80. How many was that?

A. One hundred and fifty-six company men inside, and one hundred and ninety-five coal loaders inside,—that's August 15th, No. 2 Mine. November 1st, I had one hundred and fifty-four company men inside at No. 2, and one hundred and seventy-five coal loaders.

Q. 81. How many outside men altogether at No. 2 on those two dates?

A. I have forty-nine on the outside at No. 2 on August 15th, and forty-eight on November 1st. The reason for being more men at No. 1 than at No. 2, all our shops are over [fol. 118] there, our maintenance crews for the camps and powerhouse and things like that.

Q. 82. Where, in general, do these outside men perform their duties?

A. We have various types of work outside. We have carpenters who maintain the camp,—their work is right

in the camp. We have tipple men, their work is in the tipple and around the tipple. Our shop men, their job is in the shop repairing anything that's brought in, but occasionally they might be sent out to one of the openings where we have a fan or might be sent to repair a pump or something like that, but they work wherever they have work to do.

Q. 83. Those men who have work to do at certain places, report for work where?

A. At the regular place where they work. The men in the shop report at the shop. The men in the tipple report at the tipple.

Q. 84. As to the men on the inside, speaking as of the coal loaders, do they have a regular place at which to work?

A. Yes, they have regular places at which to work. Of course, as I made mention, some work out occasionally, but they all have a regular place at which to work.

Q. 85. How is that determined, the location of that place?

A. The location is determined by the foreman. The foreman will give a man a certain place to work and he will work there until he finishes it, drives it to the extreme limits or gets so far and has to wait on ventilation, and that fellow will have to be changed from that place to another working place. The foreman has charge of that.

Q. 86. Is the place at which a man works, his usual working place in the mine, a permanent, static thing, or does it change from time to time?

[fol. 119] A. It is more or less permanent in one sense, and in another sense, it advances. A coal loader driving a heading will take a cut of coal at each shift. That means he advances his place six or seven feet. If he works three hundred days a year he will advance it twenty-one hundred feet during the year. The place is still there but it gradually advances. If he is coming back on pillar work, he gradually comes back.

Q. 87. Is this typical man of whom you speak some times moved by the foreman from one section of the mine to work in another section?

A. Yes, occasionally.

Q. 88. We are still speaking about coal loaders. Would you say that they have definite, certain and well-defined places at which to perform their duties?

A. Yes, I would.

Q. 89. Where, according to practice, have those men reported for their work for the company?

A. Each man, each coal loader,—I have reference to coal loaders right now, reports to his place of work, his working place, each morning.

Q. 90. Is there any requirement by the management of these men as to the performance of any duty before they arrive at their usual working place?

A. A coal loader has to start work in his working place, due to the fact that his tools are there. His tools and equipment is always there, other than explosives. He leaves them there the day before. The man, the coal loader, reports to his working place in the morning.

Q. 91. I asked you if there is any requirement by the management, you or those under you, for the performance of any duty or to do anything before they arrive at their usual working places.

[fol. 120] A. No, they are not asked to do anything, unless you have a slate fall or something. If you do that, you pay them extra for it.

Q. 92. That is not usual work?

A. No, that isn't usual work.

Q. 93. And if they are called upon to do such emergency work, they cease to be coal loaders and are paid as such?

A. What extra work they do is paid on a day basis.

Q. 94. Is there anything at any time under any circumstances required of your coal loaders before they arrive at their usual working places in the mine?

A. No.

Q. 95. You have referred to another general type of employes inside, namely company men. Explain to the Court, if you please, what that term "company men" includes?

A. In mining, we have to have other employes than the coal loaders,—have to have other employes. Those employes are men who lay the track, do track work. There are other men who build stoppings. Other men who help the coal loader set timbers that he is not able to handle himself, for instance, to help a coal loader set cross-collars or headers, and there are company men who might help move slate or anything like that. Those men are paid by the hour. They do not do any piece work. They are paid by the hour and they have tools that they keep with them. They go from place to place. They will go in one coal

loader's place and lay the track. They might help him set a header or cross-collar. When that work is completed in that place, they may go on to another place. However, they are paid by the hour and they are paid for walking from that place over to the next. When the shift is over with, they come out and have a place to put these tools. [fol. 121] They are at the tool house at quitting time. That's when the shift's work is over. They are there when the shift's work starts. It so happens the foreman has to be a man who has a Federal explosives license, and the foreman, as soon as they go on the shift, issues powder to the coal loaders who need powder that day, and after he issues the powder, he goes to the man station and sees these company men, they are down there, and he directs them what to do. Often these company men go on and will be doing their work without even seeing the foreman, because it is routine. They will go on at their starting time and they have a circuit that they generally make. They know who is going to clean up first. They know who has to have track first. They know who has a cut, or a piece of a cut, so, therefore, they go over the entire section.

Q. 96. You refer to a man-station or man-trip station. What is that?

A. We run the trips from the outside to the sections, and some place on that section, we will have a man-trip station and that's where the men get off the man-trip, and from there they go on to their working places. Some where near that place is a powder magazine and the men who have to have powder go up there and get the powder for that day's work only.

Q. 97. To digress a moment, and discuss that matter of powder,—you have a main powder magazine on the outside of the mine, do you not?

A. Yes.

Q. 98. And you keep in the powder magazines on the several sections in the mine such powder as is required for the day's operation?

A. We have our powder delivered to each section on an off shift.

Q. 99. What do you mean by an off shift?

[fol. 122] A. If that section is working in the day time, that powder is taken in at night when nobody is around, and he takes enough powder in there, he has an order for

how many sticks he is going to need the next shift, and he takes the exact number, and that's checked out to him. The fellow who handles the explosives has to have a Federal Explosives Certificate, and he puts in each magazine on each section just exactly the amount of powder that section will use the next day on the following shift, and from there, it is issued out to the men who use it.

Q. 100. To make that clear, does each loader at the end of the day give a memorandum to the foreman for the amount of powder he will require for the next day's work?

A. That's true. He does.

Q. 101. Is that the powder that's brought from the main magazine out to these section magazines.

A. Yes, that's true.

Q. 102. On that question of the powder, you are speaking now of the No. 1 Mine where powder is used?

A. Yes.

Q. 103. What do you use in the place of powder at the No. 2 Mine?

A. At No. 2 Mine, we do not use permissible powder. We use Cardox. That's an iron tube, round pipe, that has gas in it, carbon dioxide, and we shoot our coal with that. How that operates is something like this,—they have this pipe and fill it with carbon dioxide gas, and there is a little heater, so that when electricity is applied, it will go ahead and it will expand that gas and it will sear a little disk and that gas escapes and shoots the coal. That's safe to handle and we can haul that around as we wish. At the No. 2 Mine, we deliver that explosive right in the working place. A locomotive crew will take that right in the working place.

[fol. 123] Q. 104. Is that delivered to the working place by company men?

A. By company men.

Q. 105. These company men you mention have duties to perform in certain sections of the mine, do they not?

A. Yes.

Q. 106. A company man will be assigned to a section or area of the mine in which to work?

A. Yes.

Q. 107. Is that true of all company men?

A. They all—repeat that question.

Q. 108. I am asking you if all of the company men have a certain section of the mine in which to work. Some of the company men have to go all over the mine, don't they?

A. Yes, sir. I understand your question. For instance, our main line track men cover all the main haulage track, which extends from the tipple all the way in to, you might say, the section, and at the section where the main line track men leave off, the section track men maintain it from there on in; and we have the pumpers, they go over the entire mine, wherever we may have a pump, and our ventilation men do the same thing, they cover the entire mine. Generally speaking, though, in a mine like Jewell Valley, we have three or four brattice men over there, and we divide that up in sections,—one brattice man may have two or three coal loading sections under him, and the trolley men maintain all the trolley wire, and the sub-station men look after that.

Q. 109. Those men who have jobs to do within a certain section or area of the mine, do they have anything else to do elsewhere than within that area?

A. No, those who are put on a section work only on that section.

[fol. 124] Q. 110. Where do those men report to begin work, their day's work?

A. They generally report at the tool box or somewhere near the man station, so they can speak to the section boss.

Q. 111. Do you have a tool box at or near the man-station on each section?

A. Yes, either a box or a place where the men gather and store their tools.

Q. 112. These men who you say have duties to perform in the respective sections or areas and who report at or near the tool box, does the management require anything of those men, any duty to perform at any time until they arrive at these sections where they are to do their work?

A. I would say no, unless you have something in an emergency to do, and if you do have something in an emergency to be done, that are paid extra. Their starting time will be before the regular starting time.

Q. 113. You have referred to certain of your company men who have duties to perform all over the mine, like the pumpers who walk from pump to pump. Where does their work begin and where does their pay commence?

A. They ride a man-trip. They get off the man-trip and start. That's their starting time and they go wherever they are needed, it's a give and take proposition, to a certain extent, with a pumper, he goes to a pump and sees that it is all right and he goes to the next pump and sees it is all right, and he goes to lunch at any time. He may sit down and watch a pump and eat while he is there. Ordinarily, a pumper never has a full day's work but it starts when he gets off the man-trip.

Q. 114. As I understand, men like the pumpers get off the man-trip and start their work at the nearest place at which they are to commence on that day?

A. Yes, sir.

[fol. 125] Q. 115. Now, a section such as you have described has a limited life in mining operations, doesn't it?

A. Yes, sir.

Q. 116. As you work out a section, you will set up another section somewhere else?

A. That's true. The life of a section generally runs around about two to two and a half years,—drives up and comes back on the retreat.

Q. 117. Does each section have its man-station and tool-house?

A. Yes, generally speaking, they have. They have a man-station, each section where the men ride a man-trip has a man-station. That might be a building, might be a breakthrough, but they have a certain place to get off the man-trip.

Q. 118. You refer to the tool house. What tools, generally, are kept in such tool houses?

A. The main line men have a tool house where they keep hammers and picks.

Q. 119. Are these for the loaders' tools?

A. No, the loader's tools are always kept in the working place unless they bring something to the shop to be repaired or exchanged or something like that. The coal loader's tools are kept in the working place and the company men's tools are kept in the tool house or in a certain place on the section.

Q. 120. If I understand you, both your coal loaders and your company men who work on the sections have certain places assigned to them where their work is done?

A. That's right.

Q. 121. And until they arrive at or in the immediate vicinity of that working place, the company requires nothing of them?

[fol. 126] A. That's true.

Q. 122. And they perform no work for the company?

A. No work for the company. They don't perform any work for the company.

Q. 123. As to the men who, you say, have roving duties or duties which carry them over the entire area of the mine, you say that their work begins when they start on whatever roving mission they may have?

A. Yes. However we haven't talked about all the different kinds of work. We haven't mentioned anything about our motormen.

Q. 124. A motorman is a company man?

A. Yes.

Q. 125. I had overlooked him. I wish you would explain his work to the Court and differentiate between the main line motorman and the gathering or section motorman?

A. We have twenty-seven motors at No. 1 Mine, and twenty-five or six at No. 2 Mine, and those are divided into section motors, which are six and eight tons, and haulage motors, which range anywhere from eight to twenty tons. Our haulage motors always had their starting time at the drift mouth and when they work the seven hours, their shift is over with, and their time ends at the driftmouth. That's what we have always paid for. The gathering motorman that doesn't haul a man-trip, his time starts on the section where he gets his mine cars. That's outlined in the Union contract.

Q. 126. Suppose one of the section motormen is directed or required to haul a man-trip from the outside or a load for the company, where does his work time commence?

A. His work time, if he starts from the outside, his work time would start from the outside.

[fol. 127] Q. 127. You also have brakemen who work along with the motormen on these trips, do you not?

A. Yes, we have brakemen who ride these trips with the motormen. However, if a man-trip is gong to a section and the main line motor is pulling that train of cars, we always have another motor that pushes or acts as a safety motor; in case something happens to the first one, the other is there to protect the men. We call that the tailing motor or pushing motor. These motormen are paid from

the time they enter the drift until they get to the section, and their starting time starts there and they are paid extra for the time required to push the man-trip in until they finish the shift.

Q. 128. Do you have brakemen assigned to work on sections and other brakemen assigned to work on the main lines?

A. Yes; yes, we do.

Q. 129. Those section brakemen, where does their work commence?

A. If a brakeman has any work to do going in, he is paid extra for it. In case he doesn't have any extra work to do, his starting time starts when that locomotive starts on that section. We have an agreement to that effect.

Q. 130. You mean if anything is required of him at any time before he arrives at the section or area where he is to perform his assigned duties, then he is paid for that?

A. Yes, sir, he is paid for that.

Q. 131. Suppose, by way of illustration, that a section brakeman is on a trip going from the portal back to the section in which his duties are ordinarily performed and he is asked to throw a switch, then where does his work for which he is paid commence?

A. In that case, it would start when he threw that switch. [fol. 128] If he is not asked to do any work, he rides that man-trip and his work doesn't start until he starts on that section when he receives his mine cars.

Q. 132. Is it so that as to those men who have jobs requiring their performance within a certain section or area, that nothing is required of them ordinarily until they arrive at that section or area?

A. That's true.

Q. 133. And if something is required of them before they arrive at that area, then their pay time or work week commences immediately upon something being required of them?

A. That is correct.

Q. 134. I don't believe we have said anything about the machine men, Mr. Hagy, the men who cut the coal. Perhaps Judge Barksdale is not familiar with the method of cutting. If you will explain that, it might help.

A. In a working face or working place, which, to us, means the same thing, a coal loader during the day will

sometimes clean up that place, he will get all the coal loaded out that's been shot or been cut, and he cleans it up and goes home at the end of the shift. That night, or after the fellow leaves, a machine crew comes in, which is composed of two men. They have a cutting machine, which has a cutter bar something like, say that it will cut to a depth of six or seven or eight feet, and that machine crew will come in and cut a kerf from one side of the place to the other.

Q. 135. What is that—the kerf?

A. Kerf,—you can cut anywhere you wish to, but we cut all of ours at the bottom. That is a cut all the way under that coal. The machine men go from place to place. They [fol. 129] have a list of the places that are cleaned up and they go in one and cut that place and go to the next place and cut it, and continue that way. They are paid so much a ton at piece work for the coal they cut. However, we have some sections where the men work by the day or the hour. We have some sections where maybe we don't have enough cutting to keep the men there all day.

Q. 136. This cutting or kerf is the cutting or space between the ground or lower rock and the coal above where the cutting has occurred?

A. Yes, sir.

Q. 137. About how deep into the face of the coal does the cutter bar extend?

A. The cutter bar cuts in the coal, where we have a loose, soft bottom, he cuts generally underneath the coal and cuts all the way across to a depth of about seven feet, and idea is when we bore the holes up in the coal and shoot it, we will have an open space for the coal to expand and not be shooting on the solid, gives it a chance to crumble up and break.

Q. 138. You say these machine men who do that work, the cutting, are ordinarily piece workers?

A. Yes, sir.

Q. 139. And are paid at a rate per ton for the coal they undercut?

A. That's right.

Q. 140. Do they have certain places at which to do that work?

A. Yes, the machine men all have certain places. They are assigned a section. Occasionally, one machine crew will cut for three locomotives.

Q. 141. And their machines are placed in the mine and left somewhere near where that cutting is to be done?

A. A machine man is on a contract basis. At the beginning of a shift, he gets a list of all places cleaned up, [fol. 130] all the places he has to cut, and he goes in and starts to cut the place that's the nearest where his machine is located. He never brings his machine to the shop; always leaves it on the section unless it is broken down and needs repairing. He always leaves it at a convenient place so he can start a shift that night if he is cutting for the day shift.

Q. 142. Is there any duty required of any kind of the machine man until he arrives at the place where — is to do his work?

A. No, there is no duty. A machine man generally rides a locomotive in and they use that locomotive to push the machine from place to place. However, some of the machines over at No. 2, for instance, are brought to the drift mouth, but when these are brought out, they always ride the machine. We have so many different kinds of machines and each is a problem within itself. We have a shortwall, which cuts on the bottom and drags itself across the face, and the low vein machine, which works on the same principle, and the arcwall machine, which propel themselves into the place and doesn't have to be unloaded off the truck, cuts directly across the face without unloading it.

Q. 143. Regardless of the type of machine or its immediate location, is there anything required of these machine operators until they arrive at the place where they are to do their assigned work?

A. No, no more than this: A man who runs a machine is like a man who runs a locomotive. He is supposed to do his sanding and such as that before he starts. The man who runs the machine sets his bits and oils his machine before he starts. That's in the contract.

Q. 144. I wish you would tell the Court the cycle of operation. Go through that, all the way through, and explain how you prepare a place to cut and load your coal.

A. The coal loader, who is a piece worker, cleans the cut, [fol. 131] loads out everything and makes preparation for the next day—I am talking about in the afternoon. When he gets that place ready for the machine, he leaves out, that completes that day's work. The machine man comes in and cuts that place some time during the time he is away,

and when he comes back the next morning he finds a fresh cut in his place.

Q. 145. You say it is a part of the duty of that loader to clean his place. Just what do you mean by cleaning?

A. He loads out all the loose coal, all the coal that has been shot, and all the brow that might want to fall itself.

Q. 146. By "brow," you mean overhanging rock?

A. Overhanging coal or rock, and makes it safe for the machine man to come in and cut, puts the timbers in place so it will be safe, and has the place ready for the machine man.

Q. 147. That's the coal loader who does all that?

A. Yes, sir.

Q. 148. How is he compensated for that?

A. That's all included in his loading rate.

Q. 149. He is paid a rate per ton for the coal he loads?

A. Yes, sir.

Q. 150. And all those things you mention are duties to be performed by him, incidental to his mining?

A. That's right. He timbers, tests the cut, bores the hole, and the loading rate takes care of that.

Q. 151. I believe he does get paid a yardage or additional amount over his loading rate for the rock he takes down and loads?

A. Yes, sir. Impurities or rock that a coal loader handles, he is paid on a yardage basis. That's a piece work system. This rock or sandy shale that's above the coal often comes with the coal.

[fol. 132] Q. 152. By "comes", you mean falls?

A. Falls or is pried down with a bar or he might have to take a wedge and wedge it down. The coal loader handles that and is paid so much per yard.

By the Court:

Q. 153. How is that yardage computed? Does somebody measure it?

A. Yes, sir, our engineers come along every two weeks and measure that and they make a calculation of how much he is due and he is paid on that basis.

By Mr. Richardson:

Q. 154. You mean the engineers measure the area from which the rock has been removed and pay him accordingly?

A. Yes, sir, they measure the area from where the rock has been taken.

Q. 155. I interrupted you awhile ago. After the coal loader has so prepared his place, then he is the only person who has a part in this operation?

A. The machine man comes in and cuts the place.

Q. 156. The machine man also is a piece worker?

A. Yes, sir.

Q. 157. And is paid at a rate per ton for the coal which he cuts?

A. That's correct.

Q. 158. You have referred to certain duties that he has to perform in maintaining or operating his machine and moving it from place to place, greasing it and sanding it. Are those things included in and paid for by the rate per ton allowed him for his services?

A. That's right. He is a piece worker, and he does the extra work like greasing the machine and setting the bits, and if he has to set a safety post to make a place safe, after [fol. 133] he starts cutting, he is supposed to do that, and he is paid for that in this overall piece work rate.

Q. 159. None of those things are considered extra work, are they?

A. No, no extra work.

Q. 160. They are all part of his duties?

A. All part of his duties.

Q. 161. And his duties are performed at the place where he has left his machine and is to use it?

A. That's right.

Q. 162. And he goes to his machine and starts to work and the company pays him by piece rate for the coal which he cuts from that time on?

A. That's right.

Q. 163. Proceed.

A. The next morning the coal loader goes in or the following shift, and finds the fresh cut. That means the machine man has come in and cut the place across to a depth of seven feet, and the coal loader examines the place first to see if it is safe, to see if he has any loose roof or any draw rock that has to be taken.

By the Court:

Q. 164. I thought you said he did that before he turned it over to the machine men.

A. He sets additional posts, the cutting machine extends back about six feet and he keeps these posts back enough to keep clear of that machine. After the machine cuts and goes out, the coal loader comes in in the morning and sets additional posts.

Q. 165. Isn't the vibration of the machine enough to loosen the roof?

A. No, sir, it has very little effect on it. He sets any additional posts required and gets the machine cuttings out from under this coal, out from under this kerf, and——

[fol. 134] By Mr. Richardson:

Q. 166. What does he do with the machine cuttings?

A. Over at Jewell Valley he loads them as coal. Over at Jewell Ridge, there is a strata of impurities at the bottom of the coal and that is generally loaded in the mine cars and hauled outside and put over the slate dump. That is not put through the tipple, is of no commercial value. However, on pillars, generally we don't cut on pillars where the stumps get down to a small block, but where they cut, they gob the machine cuttings.

Q. 167. In the Jewell Ridge Mine, you say because of the character of the coal, you do gob or throw away these machine cuttings?

A. That's right.

Q. 168. And the coal loader, as a part of his job, removes those machine cuttings from the place where he has to shoot down and load the coal and puts it to a place at one side where it is out of the way?

A. That's right.

Q. 169. And over at the Jewell Valley Mine, he loads these machine cuttings into a mine car and that is taken out and shipped, used commercially?

A. Yes, sir, and he is paid by the ton for that.

Q. 170. Is there a difference in rates for the two mines determined by the local contract for that local condition?

A. There is for yardage. The coal loading rate is the same in the two mines.

Q. 171. Proceed, if you please, with the operations.

A. He gets the machine cuttings out from under the coal and he bores his hole——

[fol. 135] By the Court:

Q. 172. What does he do that with?

A. He has a bug dust shovel with a long handle——

Q. 173. I mean what does he bore the hole with?

A. With an augur. It's soft coal, it doesn't take but a little bit to bore the hole.

Q. 174. Where is that put, the augur?

A. In the bottom, and he puts a hole on the right hand side and on the left hand side up near the roof and this one will shoot down the coal on the right hand side and this one the coal on the left hand side, and after he shoots, he goes back and tests the place to see if it has had any effect on the rock, and then he is ready to load coal.

Q. 175. How deep does that bring it down?

A. The depth of the machine, whatever it is.

At this point, a recess for the period of fifteen minutes was taken, after which the examination of this witness was resumed.

By Mr. Richardson:

Q. 176. Mr. Hagy, I believe you were explaining the cycle of operations and had come to the point where the miner or coal loader had shot down the coal and was prepared to load it into the mine cars. How are the mine cars, and by whom, brought to his loading place?

A. The mine cars are delivered or brought into the working place by the motormen and brakemen who haul on that section. They place the car in the man's place, and he loads it. While he is loading that car that locomotive goes to another section and places that man, and he will do that right around until he comes back again. Ordinarily, there will be around six to twenty places on each section where a locomotive places cars. He continues that and when this man gets a car loaded, along about the time he completes [fol. 136] that, he will come back with an empty, pull the load and put the empty in and go through that cycle the entire day until that loader gets through.

Q. 177. These cars are delivered on tracks?

A. Yes, sir.

Q. 178. Who lays the tracks to the working place?

A. The track is laid by the company track men, who are paid by the hour.

Q. 179. The track is laid by the company men right up to the face?

A. Yes, up within two or three feet of the coal, ordinarily.

Q. 180. And when that car is loaded, how is it disposed of?

A. When it is loaded?

Q. 181. Yes.

A. The motorman comes and gets it and takes it out and replaces that one with an empty.

Q. 182. Under whose supervision does the coal loader do his work?

A. He does his work almost directly under the section foreman on that section, who visits his place and tells him what he must do to make himself safe, the manner in which he shall load his coal, bore the holes, timber and everything that's incidental to the mining of the coal in that place.

Q. 183. And about how many places, ordinarily, does the section foreman have to supervise?

A. Ordinarily, a section foreman will have about twelve places on an average, from twelve to fourteen. It depends on the section, on the height of the coal and how far the places are apart. The section foreman generally goes through each place twice a day. Some times we have sections where a man will have too many places to cover twice [fol. 137] a day, but he will cover the ones where he thinks a man is safe at least once a day and go through the others twice or more. If he has a place he thinks is dangerous he might go to that place three times a day, but he is required by law to go at least once a day to each working place.

Q. 184. These company men who work on the section, the track layers and the section motorman and pumpers and electricians and other men who work on the section, are they also under the supervision of the same man?

A. Yes, they are also under the supervision of the section foreman.

Q. 185. Speaking relatively, is there close supervision over these men or do they have a great deal of opportunity to work independently without any immediate bossing?

A. They are largely independent, in a way. That's one reason why so many people like mining. That's my belief, and my experience has taught me that. If a foreman only goes in a place once a day, that fellow is working there all the time almost without any supervision directly over him and naturally, everybody has a tendency to want a minimum amount of direction, but that foreman is about the only man

who directs that coal loader or the company men what to do on that section.

Q. 186. And you say this boss or supervisor goes into the ordinary place once, possibly twice and occasionally three times a day?

A. Yes, and while he is in there, he will give instructions or directions that might be for maybe the third day. He will tell the coal loader "We will clear up that cut", or this cut, and turn a breakthrough.

Q. 187. Who keeps a record of the time worked by all these men?

A. The section foreman keeps all the time on that section. I mean the section work. Of course, all of the section main line track men, pumpers, wire men, the general mine foreman keeps their time.

[fol. 138] Q. 188. As to the piece workers, the coal loaders, how is a tally kept on the amount of loading they do?

A. The motorman helps the section foreman keep check on how many cars each man loads. At the end of the shift, the motorman will tell the section foreman how many cars a certain check number loaded and the section foreman has a slight tab on it, too. He might go in and say, "How many cars did you load today?", and the man will say three or four, and he will remember that, and as the coal goes to the tipple, each car is checked and the man who weighs the coal takes the check off and gives the man credit for that car of coal. At the tipple, you have two men who weigh the coal, one represents the company and one represents the Union, and between them they keep a record of all coal weights in the tipple. Each car is weighed separately.

Q. 189. You have a record, do you, of the cutting that was done by the machine man the night before?

A. Yes, it is handled practically the same way. That coal loader that checks that car, the number, of course, is located at the scale house. The section foreman will give that machine man credit for all the coal that a certain coal loader loaded on that number. For instance, if a machine man has fifty coal loaders loading on his section, these check numbers are turned in and that machine man gets credit for all the coal loaded by these fifty men.

By the Court:

Q. 190. Is there a record kept of the time the coal loader works?

A. Yes, sir.

Q. 191. But they are not paid by that?

A. Yes, they keep a record so he will be paid overtime, all over thirty-five or forty hours, whichever it is.

[fol. 139] Q. 192. What is that, time and a half.

A. Yes, sir, over a certain number of hours.

By Mr. Richardson:

Q. 193. That, I believe, is referred to in the contract as rate and a half for over time work?

A. Yes, sir, rate and a half is what it is, and not time and a half.

Q. 194. I am not sure that you explained to the Court that the coal loaders attach to the cars which they load the checks or tags bearing their respective numbers, and with those tags a record is kept of the number of cars loaded by each loader. Is that a fact?

A. That's a fact, yes.

Q. 195. Did you explain that?

A. Each coal loader is assigned a certain number and when he is assigned that certain number, that's his account number on our payroll. For instance, we have a ridge we call Smith Ridge, that's the name of the ridge, and nearly all the miners who live on that ridge are named Smith. We may have three or four Bill Smiths, and the idea is to have a check number so we will not get their names confused. They all have social security numbers too, but by having a check number, they go by it instead of their names, so each coal loader puts his check number on each car he loads.

Q. 1[illegible]. To begin with, he gets a metal disk before he goes in the mine?

A. Yes.

Q. 197. And attaches one of those disks to each car of coal he loads?

A. That's right. It's a little brass check with a hole in it and he can attach it to the mine car and the car goes to the tipple, and the man who weighs the coal takes that check off and gives him credit for the coal he had in that car.

[fol. 140] Q. 198. In the same way, credit is passed to the machine man who has undercut that particular coal?

A. Yes, credit goes to the machine man.

Q. 199. The section foreman keeping a record of whose coal is cut by the particular machine man?

A. Correct.

Q. 200. Summarizing these things, Mr. Hagy, where does the coal loader—to begin with, where is his usual working place?

A. The coal loader, about the only place he works is in his working place, the place where he loads his coal.

Q. 201. And the machine man's working place, as I understand, is where he cuts the coal?

A. That's right.

Q. 202. Where he has the machine parked to begin that cutting?

A. That's correct.

Q. 203. And the company man working on a section is on duty at the place in the section where his work is to be performed?

A. That's correct.

Q. 204. Where do these men begin their day's work?

A. The coal loader begins his day's work in his working place.

Q. 205. Where does the pay time for these men begin, according to the Company practice?

A. Begins in the working place when they start loading the first pound of coal or doing the first amount of dead work, or whatever connected with the work in that place.

Q. 206. Or for the company men, the first work performed when they arrive at their usual working place?

A. That's correct.

[fol. 141] Q. 207. And that's true as to all of them, their pay commences as soon as they arrive at the place where their work is to be performed?

A. That's correct.

Q. 208. And does this method of operation and of paying the men apply generally throughout the bituminous coal mining industry?

A. It has at all the mines I have been connected with and I feel that it is the same way everywhere for we have the same contract in the sections where I have been.

Q. 209. You have kept yourself familiarized with methods followed throughout the Appalachian area?

A. Yes, sir.

Q. 210. Does this same system which you have described here obtain throughout the bituminous coal mining industry, to the full extent of your acquaintance with it?

A. I feel that it does.

Q. 211. Mr. Hagy, I hand you a map entitled "Jewell Ridge Coal Corporation—Tazewell and Buchanan Counties, Virginia,—Jewell Ridge, Virginia", which shows mine workings in two general sections, and ask you what that map shows.

A. The map that we have here has many colored markings. That which is in red shows the location of the man-trips at both the No. 1 and the No. 2 Mine. That man-trip, of course, starts as shown there at the driftmouth or portal. We have there brown, as the location of the places visited by the parties, the attorneys that visited the mine, and the working places, and the part they visited is shown there in brown.

Q. 212. Did you take the attorneys for the defendants, these gentlemen here, and the attorneys for the plaintiff to the same places?

A. To the same places with the exception of one, that's in [fol. 142] Ten Right,—the attorneys for the coal company did not go in Ten Right in Parallel in No. 1 Mine. We went up part of the way to the mouth of it. Otherwise, the two parties visited the same places. In blue we have the name of the sections and also the name of the man-trip, and in green, we have the entrances to the two mines marked. In violet, we have the roads traveled by the miners who walk part of the way and catch the man-trips. At No. 1 Mine, we have quite a number of openings. The miners walk in these openings and catch the man trips and ride the remainder of the distance to the man-station on their section. Taking down in the left bottom corner, we have there the portal marked, the entrance to No. 1 Mine. We have, going off to the left, we have a mine number No. 4 Mine. That's some old pillar work in the section there just a little ways from the portal. Some men walk in there and some ride a man-trip from the lamp house. All other man-trips in No. 1 Mine follow that red line over to what we have marked "Dispatcher's Office" or "New Slate Dump". The Dispatcher's Office isn't marked on this map, but on some of them it is. There the man-trip divides and some go to the left and some go to the right, and we come to what we call Two North and one locomotive works down in there and a man-trip runs down as the red line shows. The end of the red line shows where the man-trip goes to, and in that straight line of entries called Bear Wallow Main the

man-trip goes down in there and the right hand Parallel commences. We have shown there where the man-trip ends. Two man-trips goes in Parallel Main Section, one goes up in Five Right, and the other into Ten Right, Eleven Right, Thirteen Right and Fourteen Right.

Q. 213. Have you the distances from the main entrance of that No. 1 Mine to the man-trip stations on these various sections which you have just now identified?

A. I have those distances as I have figured them. Those [fol. 143] distances are, this first left hand place just inside the drift, what we call No. 4 Mine, which is the shortest distance from the portal into that section, is 4250 feet. Those distances are scaled, I didn't measure them with a tape. I scaled them on the map.

Q. 214. What is the scale on this map?

A. One inch equals one thousand feet. You can see by the coordinate line, each coordinate line equals five thousand feet.

Q. 215. The map is correctly drawn on the scale of one inch to one thousand feet?

A. Yes, sir, very accurately drawn. This was taken off a larger scale map. The lower Middle Creek Section, coming through the first tunnel, there men walk down off the mountain and catch a man-trip there, and that distance is 6050 feet.

Q. 216. I hand you here a typewritten sheet entitled "Distance of Man-trip Stations from the Portal at Jewell Ridge Mine", and ask you if that was prepared under your supervision and if it shows the correct distances from the portal of this mine to the man-trip stations on the various sections.—Does that paper show what my question implies?

A. Yes. I was just checking it. Yes, sir, it's the same.

By Mr. Richardson: We should like to introduce this in evidence, if Your Honor please.

By the Court: Let it be introduced.

The paper referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 16", and is returned as a part of this transcript.

By Mr. Richardson: Before I go further, we should like to file this map in evidence.

By the Court: Is there any objection.

No objection being interposed, the map referred to was thereupon filed, marked as:
[fol. 144] "Plaintiff's Exhibit No. 17" and is returned as a part of this transcript.

Q. 217. Will you proceed to give those distances, Mr. Hagy?

A. Where is the map that has the distances on it?

By Mr. Stuart: I will get it.

A. All that I have said about distances has been the No. 1 Mine. The man-trip to No. 4 Mine, I mentioned that as being a distance of 4250 feet from the drift.

By Mr. Richardson:

Q. 218. The No. 4 Mine is a part of the Jewell Ridge Mine, is it not?

A. A part of the Jewell Ridge No. 1 Mine.

Q. 219. Accessible through the main entrance or portal to the Jewell Ridge Mine?

A. Yes, has an opening outside where some of the men walk in that do not ride the man-trips.

Q. 220. Will you indicate on this map the first place at which the main man-trip you have traced comes to the outside?

A. After having gone through?

Q. 221. Yes, after having gone through the mine on the inside.

A. Those who are following me on this map, the man-trip enters at the driftmouth, through the tunnel and follows the right hand line where you come to the outcrop, where it is marked in green, stating "Lower Middle Creek Drift". There the man-trip stops and picks up additional miners.

Q. 222. At that point that is marked "Lower Middle Creek Drift", the entry along which the man-trip is operated comes in to the open from under the hill; is that right?

A. That's right. It is a tunnel where it entered and this is the exit to the tunnel.

[fol. 145] Q. 223. And you say at that place there are other men who enter the mine?

A. There are other men catch the man-trip there, they do not enter the mine there, they catch the man-trip there and proceed on over towards the working places.

Q. 224. Is that place that you have referred to there accessible to any of these roads that you have referred to, either the paved county road or one of the unpaved roads?

A. Yes, it is. The road is up on top of the mountain and by walking down the hollow, as these men do, they catch the man-trip. These men who walk down there live up on top of the ridges, and rather than come over to the main entrance, they walk down there and catch the man-trip and ride on in to the man-station where they get off.

Q. 225. And that is permissible practice as to the employes who wish to follow that method of getting into the mine?

A. Anyone who wishes can follow that procedure. Some left their cars up there and walked down, left their automobile up on town—not very many, but some do.

Q. 226. Moving along, if you please, I wish you would go ahead and state the other distances, always giving the distance along this man-trip entry from the main portal of the mine.

A. A distance of 9850 feet is another drift or portal and there the man-trip stops and picks up men who live up on the ridge in that vicinity. There are several men who caught the various man-trips there and continue on to the working places before the beginning of the shift.

Q. 227. Let's see if I understand you correctly. This man-trip entry is first the tunnel from the main entrance to the mine, through the hill to a hollow where it emerges into the open and there you pick up certain men who enter that [fol. 146] way, and then it goes back under the hill again, that is to say, in a tunnel, and as I understand you, comes out at another place?

A. Yes, comes out at another place.

Q. 228. What is that other place it comes out?

A. It is several hundred feet to where it comes out but the next place where that man-trip stops is on the inside, where there is an opening that leads to the outside, that we call the Jones Fork Drift, and there men come down and have carbide lights and walk inside until they get to the main line. They only walk in a distance of about three hundred and fifty feet, and there they wait until the man-trip takes them to wherever they are going. That's another stop where the man-trip stops and picks up miners.

Q. 229. This place you have just now referred to is the point at the northern portion of the open section of this man-trip entry on Upper Middle Creek drift?

A. That's the one we were talking about before the last one. The Upper Middle Creek Drift is the second stop where we pick up miners. The third stop is Jones Fork Branch. That's where the men walk in about three hundred and fifty feet, something like that.

Q. 230. Both of these two points you have referred to, the Lower Middle Creek and the Upper Middle Creek Drift are in the same section of the open part of this man-trip entry?

A. As will be noted by the red line, that track is on the outside, it isn't under cover between Lower Middle Creek Drift and Upper Middle Creek Drift. That's not in coal. These other tunnels are in coal. This track is outside in the open.

Q. 231. This place at the Upper Middle Creek drift, this entry goes underground again?

A. Yes, sir.

[fol. 147] Q. 232. In the coal, as you put it?

A. Yes, sir.

Q. 233. Is that point accessible to other men in that neighborhood who work in this mine?

A. Yes, sir.

Q. 234. Do other men enter at that point?

A. Yes, sir, I have a record of who they are.

Q. 235. Proceed, following the entry line.

A. Following the red line there, leaving Jones Fork Branch,—do you want to dwell on that more,—we follow the red line until we come to a distance marked 15,280 feet. That's the dispatcher's office, and to the left we see a line leading out, stating "New Slate Dump". There is where some men walked down off the ridge and use carbide lights and walk into the dispatcher's office and catch man-trips going further in the mine, or towards the man-stations on each section, but at the dispatcher's office the man-trip divides, some go to the left and some to the right, depending on where the men work. These man-trips are made up outside. Each trip has a car next to the locomotive that is a tool car, and behind that they have the train of cars where the men get in, and it is made up outside so the trains of cars will go into the sections where the men work, and right at the dispatcher's office is where we make the first division of the man-trips.

Q. 236. Take the one that leads to the left and give the distance to the one marked "Gravel Branch".

A. That's 19,180 feet. That's the distance from there to the driftmouth where the man-trip starts. At that point, the men unload and walk the remainder of the distance to their working places down in Gravel Branch. That line that comes to the outside is where a fan is located and there are men who walk in there and all the way down to the working section and never catch a man-trip. To the left we [fol. 148] have another one marked, called Drainway Drift. We have men who walk in there and catch a man-trip and ride down to One North or Gravel Branch, and some work in another section there where we do not have a man-trip to. Further down on that section, we have One North, that man-trip goes 19,480 feet from the main drift. They get off there at the mouth of those entries that go to the left away from that red line and walk the remaining distance down to the working place. Are there any questions about that down in there?

Q. 237. Are there any openings to the North of First North through which men enter?

A. I just mentioned there before, we have the Gravel Branch Drift where men enter.

Q. 238. That's to the west, isn't it?

A. Nothing in the north, no. All these hatched black sections show where the coal has been extracted. That's all pillar work, so there is no way anyone can go that way to the outside.

Q. 239. Coming back to the dispatcher's office and following the right hand fork of the entry, trace it, please.

A. The first line leading off that right hand fork just mentioned is a distance of 17,980 feet. We call that the mouth of Two North Entry, and there a man-trip goes down to Two North Section and there where the man station is is 20,580 feet from the drift.

Q. 240. You say the man-station on Second North is 20,580 feet from the drift mouth?

A. From the drift mouth where the man-trip starts.

Q. 241. Is there not another place very close to the junction of the main entry and that one leading to Second North where the entry again comes into the open?

[fol. 149] A. Yes, as marked there "Bear Wallow Drift". There are two drifts. The track comes outside and goes a distance of about two hundred feet and goes inside again, two drifts, so you have an outside track there and that outside track is maybe two hundred or two hundred and fifty

feet, something like that, apart. There at that point, Bear Wallow Drift, we have men who work in that drift who come back to the man-station and catch a man-trip there and ride down into the Two North Section. There we have men walking towards the tipple a distance of several hundred feet.

Q. 242. What is the approximate distance that these men entering there and going to Two North would proceed on the man-trip?

A. That distance from Bear Wallow to the mouth of Two North where they would get on the trip would be the difference between 18,480 feet and 17,980 feet, that's a short walk, and they would ride from 17,980 feet down to 20,980 feet.

Q. 243. Now, from the Bear Wallow Drift Junction, the entry parts again, Follow the left hand branch of that and identify the sections and give the distances, please.

A. The one forking there to the left, follow those entries to Bear Wallow Mains,—we drove several entries parallel to each other, down to where the man-station is, 23,660 feet to the drift. Down on that section, however, back several hundred feet from where the man-station is, we see an opening outside. We have some men who enter there and do not ride the man-trip at all. They walk to the working place.

Q. 244. That's the extreme section on that branch of the entry?

A. Yes, sir.

Q. 245. Following the right hand fork, will you give the sections served by that entry up there and the distances from the main entrance?

A. Taking the right hand fork, we go through a tunnel. [fol. 150] That's a tunnel in the coal. If you will notice, on the right of those entries, it goes through a short spur of that hatched out section. The coal has all been extracted in there. This is a tunnel and it comes out again at what we call the Parallel Drift and there the man-trip stops and lets the men off who work up in this section to the right of that. There are two entries up in there that we call Three and Four Right, and the men walk to their places up in there. However, the remaining ones on the man-trip that work down in Parallel Mains remain on the trip and ride on down to Parallel Mains there. The first station there is 23,460 feet from where the man-trip starts and the next station is 24,060 feet from where the man-trip starts. That's down in

Parallel Mains. Off of that we have shown there Ten Right and Fourteen Right, showing where the party visited when they visited this Mine, and also the distances shown from the main drift to where they were approximately.

Q. 246. That is the section that is most distant from the main entrance?

A. That's the one most distant from the main entrance.

Q. 247. That's the place to which you took the gentlemen who came there representing the plaintiff and those representing the defendants alike?

A. That's correct. There are quite a number of men who work in this Parallel Drift, marked 20,960 feet. We have quite a number of men who come off the mountain and walk in there and walk all the way to the working places. We have some who may catch the man-trip and sometimes they walk. Going on through the hill, we have another place marked, called Indian Creek Drift. There the working entry cuts outside again and goes into another hill. It isn't advanced very far. There we have quite a number of men who walk off the hill and walk in and never ride a [fol. 151] man trip. They come down to the drift and use carbide lights and walk into the section and get their electric lights and never ride a man trip. It might be mentioned there, just inside that drift, this Parallel Drift is another man trip, a branch of the one that comes to that drift, a train of about six or seven cars goes on up and lets a few men out at what we call Six and Seven Right, and the remainder goes on to Five Right. That distance where they get out at Five Right is 23,680 feet, and up there is another place where men walk in and these men walk to their working places. That's at Five Right Fan. All this is No. 1 Mine.

Q. 248. Mr. Hagy, while you are testifying about the Jewell Ridge Mine and the number of men who enter at these various points, I wish you would turn to your records there and state how many employees, either coal loaders or company men, who work on the inside, enter the mine at places other than the main entrance to this Mine No. 1, and give the number who enter at each one of the respective places.

A. Would you like for me to give the numbers first? I have that in a notebook I have.—These numbers were taken from the section foremen, I asked the section foremen to give me the number of men who walk in.

Q. 249. Do you know those men?

A. I know most of them. Some I will not know, but most I do know. Some I know the check numbers and do not know the names. Others I know the men. Out of twelve or fifteen hundred men, you can't know the check number and name both, but I do have the check numbers given me and to the best of my knowledge, they are correct.

Q. 250. If you will please, give the number of men who enter at each one of those openings and say where those men go. Is it more convenient for you to do it another way?

A. No. Those that work in Bear Wallow drift and catch [fol. 152] the man trip at the mouth of Two North, that walk backward, as I mentioned, there are two of them that go to Two North.

By Mr. Rogers:

Q. 251. Two men that go in at Bear Wallow Drift?

A. Yes, sir. No, they walk in and go out to the mouth of Two North.

Q. 252. They come into the mine at Bear Wallow drift?

A. Yes, sir.

Q. 253. Two men?

A. Yes, sir. We have three that catch a man-trip there and go down to Bear Wallow.

Q. 254. So there is a total of five men who get in there?

A. Yes, sir. And we have one man who catches a man-trip at the upper end of Middle Creek and rides to Two North, and we have two men who go in at the upper end of Middle Creek and ride to Bear Wallow, and we have one man who catches a man trip at the lower end of Middle Creek and rides to Two North. We have three men who catch a man trip at the lower end of Middle Creek and ride to Bear Wallow. We have four men who get on at the same place, the lower end of Middle Creek, and ride to Parallel Mains. We have two others who get on there at the lower end of Middle Creek and ride to Gravel Branch Section and at the same place, we have eight that go to One North Drainway. Now, those that walk in at Jones Fork Branch and catch a man trip as it passes, we have five that go to One North and two that walk in at Jones Fork and catch a man trip that goes to the Parallel, Main Parallel. We have three that walk in there and go to One North Parallel, and two that walk in there and go to One North

Drainway.—All these were taken off the payroll. You wouldn't have that many all the time, but you have that many on the payroll that do that. Those that walk in to the dispatcher's office and catch a man trip and ride from there, [fol. 153] we have one that goes to One North. We have one that goes to One North Parallel. We have two that catch a mantrip outside of Bear Wallow Drift, on the outside of the drift, and ride to Bear Wallow.

Q. 255. Are they the two you mentioned? You mentioned two and later three.

A. I know what you have there. There might be an error in typing. Some of this has been erased. I would have to check my notes to check back on it. That one particular number, I would have to check back to see. We have two that catch the man trip outside of Bear Wallow Drift and go to Bear Wallow, and four that catch a man trip there and go to Parallel Mains. Those that walk in, I have one that walks in at Bear Wallow, comes up through where the fan is. We have seventeen that walk in the Parallel, never ride a man trip, and we have five that walk in Gravel Branch and do not ride a man trip, and we have three men that walk in the No. 4 Mine and do not ride a man trip. Those should total seventy-two men.

By Mr. Richardson:

Q. 256. Seventy-two men who enter the mine at places other than the main entrance or portal and move to places where they work in the manner you have described?

A. Yes, sir.

Witness stands aside.

And, thereupon, the hour of 5:00 o'clock P. M. having arrived, Court was adjourned until tomorrow, Thursday, the 18th day of November, 1943, at 9:30 o'clock A. M., at which time the trial of this case was resumed.

[fol. 154] By Mr. Richardson: If your Honor please, we have two witnesses here today upon whose time there are considerable demands if we would be permitted to, we would like to interrupt the testimony of Mr. Hagy and introduce these gentlemen.

By the Court: All right. Proceed with that.

CHARLES O'NEILL, another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Richardson:

Q. 1. Your name, I believe, is Charles O'Neill?

A. That's correct.

Q. 2. Where do you live, Mr. O'Neill?

A. My home address is 69 Griffin Avenue, Scarsdale, New York. My business address is 420 Lexington Avenue, New York.

Q. 3. What is your business?

A. President of United Eastern Coal Sales Corporation, and director of a number of coal companies, and also President of Central Pennsylvania Coal Producers' Association, the District in which we operate the bulk of our mines.

Q. 4. What area does that Association include?

A. It includes about fifteen counties in the Central part of Pennsylvania and employs about fifty thousand men and produces about fifty million tons of coal a year.

Q. 5. How long have you been connected with the bituminous coal mining business?

A. I went to work in the mines in 1898, as a coal miner, [fol. 155] and I have been, except for a very short period, associated with the industry since that time.

Q. 6. Have you had some association with the making of wage agreements?

A. Yes, I have had some experience in that connection. I was at one time an officer of the United Mine Workers of America and participated in the scale committee, the wage making committee, for my first time in 1916, and I have been engaged on those committees since that time, except for a period when there was no Union relations in the District, lasting about three or four years.

Q. 7. Does your acquaintance with the proceedings in the wage negotiations between the operators and the employees extend back of 1916?

A. Well, as a member of the United Mine Workers and my employment by them in their office at Clearfield, Pennsylvania, I was quite familiar with the proceedings prior to that time, but was not a scale committeeman, as it was called, prior to 1916.

Q. 8. In 1916, what was the practical method of making the wage contracts between the employers and the Union in the bituminous coal mining industry of this country?

A. Prior to 1916, what is referred to and commonly termed the basic wage agreement was made by the Mine Workers and the operators in Western Pennsylvania, Ohio, Indiana and Illinois, and that contract, when made, became the basis for the contracts throughout the rest of the country.

Q. 9. Since that time, what arrangement has been followed?

A. Under the NIRA, a Code of Fair Competition was worked out between the United Mine Workers and the coal operators. That was a reestablishment of Union conditions in practically all of the Northern Districts and in the Southern Districts. The operators who made the first agreement [fol. 156] with the United Mine Workers, which then became substantially the wage provisions of the Code, were the operators from Pennsylvania, Ohio, Maryland, West Virginia, Eastern Kentucky and Southeastern Tennessee and the panhandle of Northern West Virginia, and what's commonly referred to as the Northern West Virginia-Fairmont District.

Q. 10. The NIRA Code applied generally throughout the entire bituminous coal mining industry of the country, did it?

A. Yes. When the first agreement was made, which was September 26, 1933, and became effective October 2, 1933, the Code carried with it the results of the wage agreement which I have just outlined, and which was known as the Appalachian Agreement, to the other Districts throughout the United States.

Q. 11. Mr. O'Neill, in stating the various sections which were included in this basic agreement just now, I am not sure that you included Virginia.

A. And Virginia was also a part of it.

Q. 12. Have you participated consistently in the Wage Conferences since 1916?

A. In all of the Central Pennsylvania Conferences from 1916 to 1933. Prior to 1933, Central Pennsylvania was what was called an outlying district. It was not a part of the Central Competitive Field which I have just described. Since 1933, I have participated in all of the Appalachian Conferences and have been a member of the Negotiating

Committee each year since that time, on each contract-making year since that time.

Q. 13. In 1916, what interest did you represent?

A. I was then secretary of the Central—'sixteen?

Q. 14. Yes, sir.

A. I was Vice-President of District No. 2, United Mine [fol. 157] Workers of America. That's Central Pennsylvania District.

Q. 15. By 1933, when the NIRA Code was adopted, whom did you represent?

A. I was Vice-President of Peel, Peacock & Kerr, and represented that coal producing and mining interest, they having a number of producing companies, about four or five producing coal companies.

Q. 16. So at that time, you were speaking for a group of employers?

A. That's right. I was also elected President of the Association that year and participated in that negotiation as President of this Association.

Q. 17. What Association?

A. Central Pennsylvania Coal Producers Association.

Q. 18. You have been President of that Association ever since 1933?

A. That's right.

Q. 19. You have been on the sub-committee of the Wage Conferences for determining the wage scales at subsequent wage conferences, have you?

A. I have been on the sub-committee in every conference since 1933.

By Col. Harris: I recall that your Honor yesterday expressed a desire to be informed of the historical background. With all deference to Your Honor's feeling in the matter, yet to preserve our position, we would like to have it understood that all objections, those we stated as to materiality and the detailed objections I interposed in my statement yesterday, be re-interposed to all questions dealing with all negotiations in which Mr. O'Neill participated; in other words, as we see it they are subject to the objections that we interposed on yesterday.

By the Court: Your objection will be noted and overruled and exception noted and it will be understood that that objection and exception goes to all the line of questioning as indicated by counsel, and need not be repeated for each question.

[fol. 158] Q. 20. What did that sub-committee do?

A. What the subcommittee does, is after the formal conference or public proceedings are suspended, meet with a similar committee of the United Mine Workers and in that council, try to work out the details of an agreement which may be reported back to the general conference, where it is ratified.

By the Court:

Q. 21. At what time are you referring to now?

A. In each case.

Q. 22. Since 1933?

A. Since 1933.

By Mr. Richardson:

Q. 23. So this sub-committee of which you were a member was the core of the Wage Conference?

A. That's right.

Q. 24. It was composed of a relatively few representatives from each side and they did the actual work of negotiating?

A. They did the actual work of negotiating and editing the agreement, which was presented to the general conference.

Q. 25. Mr. O'Neill, has the matter of hours of work been a subject of consideration at the Wage Conferences from time to time?

A. The hours of work and the wage rates themselves are the principal considerations of a Wage Conference.

Q. 26. That's the heart of the agreement?

A. That is the heart of the agreement.

Q. 27. In that consideration, I take it the Workers would contend for shorter hours and the employers would want more hours of work,—is that generally so?

[fol. 159] A. That is generally so. The Workers have always pressed for the shorter hours, and have generally been resisted by the employers.

Q. 28. There has been, has there not, a gradual shortening of the work-day in the bituminous coal mining industry through the period of your acquaintance with it?

A. The relationship of the United Mine Workers on hours begins a long way back. The eight hour day at the place of work was established first by the United Mine Workers and

Operators' contract on April 1, 1898. The eight hour day, as we call it, was changed on April 1, 1934, to a seven-hour day at the place of work.

Q. 29. Was that eight hour day at the time you mentioned established as a basic thing for the industry throughout the United States?

A. I would say, generally speaking, yes. There may have been some objections to that that I can't recall. In other words, you must recall this fact, in considering that, that the Union was not always as strong as it is today and may have had to compromise its position, but officially and generally, throughout the industry, it was an eight hour day.

Q. 30. What did that eight hour day mean?

A. It meant eight hours of actual work at the place of work. A man's time began when he reached the place of beginning his day's operation, above ground or below ground.

Q. 31. Did it include any of his travel time in getting to his place of work?

A. Well, it never included travel time as a matter of pay or as a matter of work. The work day began when he reached his face, if he was a miner, or if he was a locomotive runner, it began when he got to the passway where he picked up his locomotive. If he was a hoisting engineer, it began when he started to wind the cage.

[fol. 160] Q. 32. Was that universally recognized in the industry?

A. It was recognized universally in the industry in all wage contracts between the United Mine Workers and the coal operators, and so far as I know, was always recognized in those localities where there was no relation maintained between the Union and the company.

Q. 33. Did you ever know of any exception to that rule in the bituminous coal mining industry in this country?

A. I never knew of any exception in the bituminous coal mining industry in those parts of the industry where I am familiar. I never heard of any anywhere else.

Q. 34. Your work in the Association and in the Conferences has familiarized you with practices throughout the country in this industry, has it not?

A. I would say very generally with the practices in the bituminous coal industry east of the Mississippi River.

Q. 35. Mr. O'Neill, will you inform us whether it was mutually understood and recognized as between the em-

ployers and employes in the various conferences with which you have an acquaintance that the travel time in the mines or otherwise in getting to their working places was not work?

A. I never heard it referred to as work until now, until this present Wage Conference.

Q. 36. And in all the other Conferences and proceedings, was it mutually recognized as not being work?

A. Well, so far as I know, and so far as I can testify in my own behalf, it was never recognized as work. The compensation began when the man reached his place of work and actually began to perform his daily task.

[fol. 161] Q. 37. And stopped when he completed his daily task at his working place and didn't include the return time any more than the approaching time?

A. Yes, the starting time and quitting time was based upon beginning his task wherever it might be in the mine at seven o'clock in the morning, if that be the time, and ending seven hours later, excluding a thirty minute lunch period.

Q. 38. In the conference was there discussion of the travel time as a factor entering into the conditions of employment?

A. Well, in the old days the miners used to make a claim for bank to bank payment, which in the nomenclature of the industry has now been made portal to portal or collar to collar. These demands were not too frequent and I always considered them as a way of asking for a further wage increase and the practice of the industry was that when there was to be a change in wages, that the rates themselves at the place of work were all that was ever changed.

By Col. Harris: I assume, if the Court pleases, that rather than interrupt the witness as he goes along, any question of conclusions or opinions which he may intersperse in his testimony, that we may have a right to move to strike out at the end.

By the Court: You may.

A. Since 1933, I do not recall of any demand for pay for the time spent in traveling underground until the Mine Workers' demands were presented at the New York Conference this year, March 10th.

Q. 39. Do you remember any such demand since 1916?

A. I think the Mine Workers included that demand in their request for changes in 1919. That's my recollection of it.

Q. 40. What were the conditions existing at that time?

A. In 1919,—I don't know how to say it,—on November 1, 1917, a contract was negotiated between the United Mine [fol. 162] Workers and the operators, which was approved by the United States Fuel Administration for the duration of the war. During the war that contract was carried out and a question arose after the signing of the Armistice on November 11, 1918,—the Mine Workers believed that the war ended when the shooting stopped. The operators took the position that the war ended when the President issued a proclamation of peace. In November, 1919, the Miners held a convention in Cleveland, Ohio, and made some demands and said that the war was over and that they had a right to ask for a change in the wage agreement. That resulted in a strike beginning November 1, 1919, and finally resulted in negotiations between the Government and the Mine Workers, the appointment of a Commission by the President of the United States, after he had re-established the Fuel Administration, re-established the maximum prices that had been promulgated during the war by the Fuel Administration, and a temporary award of fourteen per cent increase in wages was granted the Mine Workers while a hearing would be conducted by the Bituminous Coal Commission appointed by President Woodrow Wilson.

Q. 41. At that Conference in 1919, did the Union present comprehensive demands including its accumulation of all demands not theretofore stated?

A. The Union presented very comprehensive demands, including—I have forgotten the figure, a demand for increase in wages, a six-hour day, bank to bank, and many other changes in working conditions.

Q. 42. Can you say whether there was any insistence in that conference upon the payment of wages on a bank to bank basis, as affecting a departure from the established face to face basis of pay?

A. My recollection of the hearings that were conducted by the Coal Commission was that the pressure and emphasis made by the Union was for an increase in wages, which [fol. 163] they felt that the prices and the profits and the post-war inflationary boom which was then beginning to

present itself justified. I do not remember any particular emphasis on the bank to bank proposal.

Q. 43. Do you remember whether there has been any demand by the Union at any time since 1919 for the bank to bank or portal to portal pay?

A. I do not.

Q. 44. Were there, to say it otherwise, any travel time demands at any time between 1919 and 1943?

A. Not within my recollection.

Q. 45. You have been closely in touch with the Conferences and proceedings throughout that period?

A. I have,—except this time.

Q. 46. Yes, I understood you excepted 1943 when you said there were certain demands made. Did you participate, Mr. O'Neill, in the hearings before the National Industrial Recovery Administration, looking to the promulgation of a General Code of Fair Competition for the Bituminous Coal Mining Industry?

A. Yes. I was at those hearings, so far as the Bituminous Coal Industry was concerned, and participated as a witness.

Q. 47. That was in 1933?

A. Nineteen and thirty-three and 'thirty-four.

Q. 48. The general code hearings were had first in the summer of 1933, were they not?

A. That's right.

Q. 49. Do you know whether the United Mine Workers, as an organization, was represented in those hearings?

A. Yes, they were very well represented in those hearings, and very actively participated in them.

[fol. 164] Q. 50. You say that you testified. Who testified in behalf of the Mine Workers?

A. The principal witness, of course, was Mr. John L. Lewis, president of the Union.

Q. 51. Have you known Mr. Lewis for some time?

A. I think I first met Mr. Lewis in 1911.

Q. 52. And you have known him ever since that time?

A. Oh, yes.

Q. 53. Did you hear his testimony on that occasion?

A. Yes, I was present when Mr. Lewis testified.

Q. 54. Was the matter of hours of work an important consideration in that hearing?

A. Yes, it was a very important question in that hearing. I might say that my recollection is that since 1919 the

United Mine Workers have persistently had as one of their aspirations and demands a six-hour day.

Q. 55. Is that a six-hour day at the face, or how?

A. Well, that's my understanding that it was at the face. They never asked for bank to bank. It was a six hour day on the same basis as we had had an eight-hour day.

Q. 56. Go ahead, please.

A. Well, as a result of the hearings on the Code and the negotiations that were contemporaneous with the making of the Code, an Agreement was reached, by the sub-committee, and later ratified by the various districts and the General Conference, for the re-establishment of the eight-hour day at the place of work, and for the first time, limiting the work time in the week to five days.

[fol. 165] Q. 57. Mr. O'Neill, I interrupt you. You said that for years, perhaps since 1919, one of the aspirations of the United Mine Workers had been a six hour day?

A. That's right.

Q. 58. I interrupted you to define that six-hour day, which you did as six hours at the face?

A. That's right.

Q. 59. In the Code hearings before the NRA Administration, were those aspirations expressed in behalf of the Union?

A. Yes.

Q. 60. What, if you please, was the position taken by the Union in respect to the hours of work?

A. The position taken by the Union in respect to the hours of work was that it was to be actual work at place of work.

Q. 61. And was to be a six hour day?

A. And was to be a six-hour day. That was their request.

Q. 62. Was their contention made before the NIRA for shifting from the face to face to the bank to bank basis of computing work time?

A. No there was not.

Q. 63. Now, there was approved and promulgated a general Code for the industry coming out of this hearing we have just discussed?

A. That's correct.

Q. 64. That Code prohibited employment, speaking generally, for more than eight hours a day or forty hours a week, I think?

A. That is correct, I think, except for emergencies and accidents. A man might be employed a longer time and paid time and a half where they worked more than eight hours.

Q. 65. Did that prohibition in excess of eight hours a day or forty hours a week take into account the travel time in [fol. 166] the mines?

A. It took into account all time and there was no time limit in it. It was straight eight hours of work at the place of work, five days a week.

Q. 66. If a man working in the mine actually worked eight hours a day or forty hours in a week, and in addition to that, spent time coming to and leaving his place of work in the mine, that was still permitted and within the NRA Code, as you understood it?

A. That's right.

Q. 67. And was that understanding the basis upon which the industry operated?

A. That's right. I might make one correction in my stat-ment. The prohibition as to work over eight hours a day or forty hours a week except in cases of accidents and emergencies, there was no time and a half or rate and a half requirement in that contract for such work. That was paid as straight time.

Q. 68. Did the Union, through Mr. Lewis, or otherwise, continue, after the promulgation of this NRA code, to urge its six hour a day program?

A. I think they have asked for the six hour day in every proposal since that time. I know they made it again in 1934. I think generally they have made it every time.

Q. 69. What was the reason assigned for urging the six hour day in 1933 and 1934.

A. Well, generally, the arguments advanced in 1933 and 1934, was the one in line with what you might call public policy or National policy, to divide the work. We were just coming through a terrible depression and there was a general propaganda and encouragement by Government for [fol. 167] every one to divide employment as far as practical. That was one of the reasons advanced by the Mine Workers to shorten the work day and increase the number of men who might be employed. On that theory, we did restrict the work day to five days a week at that time.

Q. 70. Mr. O'Neill, do you know whether it is a fact that Mr. Lewis in behalf of the United Mine Workers, filed a

brief of argument in support of his position taken before the NIRA at the general code hearings?

A. I just don't recall the brief. Everybody did file briefs. I don't know—I can't recall his brief. Undoubtedly he did, but I don't know.

By Mr. Richardson: Because it is at an appropriate moment, if your Honor please, we wish to tender and ask leave to file a copy of a brief which was filed by Mr. Lewis, supporting the general Code. This has been checked by the gentlemen of the opposition as to its authenticity.

By the Court: Do you wish to make the same objection you made to the other documents, or have you anything else to add to it?

By Col. Harris: I think all those objections we put in yesterday would probably be sufficient.

By the Court: I should think so. The document will be admitted upon the same conditions the documents were admitted on yesterday.

By Mr. Rogers: My information is Mr. Lewis never filed any brief. This purports to be a summary of the statements made by Mr. Lewis generally, and we have no objection to its going in under the same objections and conditions, but to keep it clear we make this statement.

By Mr. Richardson: My authority for using the term "brief" and ascribing it to Mr. Lewis was the United Mine Workers Journal, from which I took as photostatic sheets the copy which has been introduced.

The document referred to was thereupon filed, marked as: [fol. 168] "Plaintiff's Exhibit No. 18", and is returned as a part of this transcript.

Q. 71. At the 1934 conference, you say the Union again urged its six hour day program?

A. That is right.

Q. 72. I wish to inquire if at that time it urged any shift from the face to face basis of pay?

A. It did not.

Q. 73. So again the six hour day for which contention was made was six hours at the usual working place?

A. That's right.

Q. 74. Exclusive of all travel time going and coming?

A. That's right.

Q. 75. The result of the 1934 Conference was to shorten the basic working day, was it not?

A. That is correct. It was changed from eight hours at the place of work to seven hours at the place of work, and thirty-five hours a week instead of forty hours a week.

Q. 76. That has been basic throughout the industry since that time?

A. That is correct except as to the modification of the agreement made, generally speaking, last February, at the request of the Department of the Interior, to provide for a six day work week at time and a half and rate and a half, which is now in effect.

Q. 77. Was that to permit the war time excessive demands for additional fuel?

A. That's right.

Q. 78. That time and a half and rate and a half pay to which you have referred applied to all time worked in production above seven hours a day or thirty-five hours a week? [fol. 169] A. That is correct.

Q. 79. But that had nothing at all to do with the travel time, as such?

A. No.

Q. 80. Did you participate in the hearings before the Senate or the Congress on the Wage and Hour or Fair Labor Standards Act?

A. No, I didn't testify in the Fair Labor Standards Act hearings.

Q. 81. After that Act was passed, did you recognize any similarity between Section 7 of that Act and the hours of work provision of the NIRA Code?

A. Well, I think, as I recall them, they were about substantially the same thing. I don't remember the exact language of them, but my recollection is that the provision for limitation of hours and weekly work was substantially the same in the NIRA Code as it was in the Fair Labor Standards Act.

Q. 82. Except that in the Fair Labor Standards Act, as you pointed out a while ago, there was added the provision for penalty wage at one and a half times the rate if the prohibition against employment should be violated?

A. That's right.

Q. 83. When did you first hear of any question as to the application of Section 7 of the Wage and Hour Act to the travel time question?

A. Well, the first time I heard of it directly was in the early part of January, 1940, or the latter part of December,

1939, I can't definitely fix that time. However, that's simply because I didn't have time to check it. But at that time an investigator by the name of Ashmede, from the Regional Office of the Wage and Hour Administration, located at [fol. 170] Pittsburgh, appeared at the Revloc Shaft of the Monroe Coal Mining Company, located at Revloc, Cambria County, Pennsylvania,——

Q. 84. Is that in the Central Pennsylvania Field?

A. That's in the Central Pennsylvania Field, and I am a director of the Monroe Coal Mining Company. This investigator began an investigation of the various items covered by the Fair Labor Standards Act, such as the situation as to handicapped employes, the situation as to deductions, so that the minimum wage,—to see whether the minimum wage was or was not being paid, as to whether or not the overtime provisions of the Fair Labor Standards Act were being complied with, and also included in his investigation travel time to the shaft. That was the first notice we had of any question about travel time, or that I had directly, of travel time under the Fair Labor Standards Act.

Q. 85. What word came to you out of that investigation?

A. The word that came to us out of the investigation was, first, that a consent decree in the Cornucopia Gold Mining Company case had indicated the necessity for change of policy by the Wage and Hour Administration and the minor corrections that were discovered by this auditor were settled on the ground as to people whom he found had not received all the overtime, of which there were a few, that the Act provided they should have. In all other respects, he found the company's application of the law to be correct, except that he continued his investigation of travel time and made quite an exhaustive report to his superior, a Mr. Calfee, who was Supervising Inspector, I think, of that office, in which he discussed at length travel time, and stated in his opinion that travel should not be applied in the mining industry and that the face to face basis of payment was a proper one. That report was made about the 14th of February, 1940. In his study of travel time, he indicated that if it were applied to that mine, as they sup- [fol. 171] posed the Cornucopia Gold Mining Company decision affected travel time, that the company then owed a very substantial sum of money.

Q. 86. Do you remember about what?

A. Well, I think he figured on his basis of calculation at that time that the amount of money would be in the neighborhood of $70,000.00.

Q. 87. You mean owed that to its employes?

A. Owed that to its employes, if this interpretation was placed upon travel time for coal miners.

Q. 88. And that was for the travel time accumulated since October 24, 1938, down to this period in February, 1940?

A. Yes, and was based, of course, in the first year on a forty-four hour week and the second year on a forty-two hour week, and the forty hour week had just begun, so the accumulation would be much more rapid from that time forward, if that interpretation had been insisted upon.

Q. 89. Do you remember how many employes there were at that time?

A. Twelve hundred, and about nine hundred and eighty under ground; quite a large mine and produced something over a million tons a year. When this report was made known to the Company, of course we decided maybe we had better look into the matter somewhat. Mr. Cowan, who is Vice-President in charge of operations of that Company, called me up and we went over this report and decided we ought to do something about it. We made,— Mr. Cowan made a number of trips to Mr. Calfee, and I finally decided I ought to go and talk to the United Mine Workers about it. I talked to Mr. John L. Lewis some time after this report came out, I would say probably around March 1st, brought it to his attention.

Q. 90. Nineteen and forty?

A. Nineteen and forty. Of course he was rather noncommital and I think rather surprised that the question [fol. 172] could arise in that fashion. We contacted the Philadelphia Office of the Wage and Hour Division, which office is superior to the Pittsburgh office, the Pittsburgh office is a branch of the Philadelphia Regional office——

Q. 91. When you say "we" contacted, whom do you mean?

A. Mr. Cowan, of the Monroe Coal Mining Company,— we got Mr. Gallagher, who was the counsel for the Regional Supervisor, the head of that office, Mr. Dorsey, and he wrote a report in which he confirmed that face to face time was the proper one in the mining industry. We still

were unable to get a closing of the Monroe Coal Mining company case. I again called Mr. Lewis on the telephone, I don't know the date of that, and he referred me to Mr. Lee Pressman,—Mr. Pressman was at that time General Counsel of the CIO, and Mr. Lewis was then, I think, President of the CIO, and Mr. Pressman's office was at that time, I believe in the United Mine Worker's Building. However, I called Mr. Pressman and told him about these reports, but still we did not have this case closed. He said that he would take the matter up with the Wage and Hour Division. On March 15th, he called me by telephone and told me that we should call on a Mr. Mertha, who was a lawyer in the Wage and Hour Division. Mr. Cowan and I called on Mr. Mertha and had a conference with him and felt very much dissatisfied with the results of the conference with Mr. Mertha.

Q. 82. That was in Washington?

A. That's right, at the main office of the Wage and Hour Division. I reported to Mr. Pressman that we were very much dissatisfied with the attitude of the Wage and Hour Division. Nothing happened, and Mr. Cowan came back down to the United Mine Workers' office and we were referred then to Mr. Earl S. Houck. Mr. Houck was the Director of the Legal Department of the United Mine Workers. Mr. Houck accompanied Mr. Cowan and I to the Wage and Hour Division. We met Mr. Mertha and Mr. [fol. 173] Wiseman, another attorney in the Department, and went over this whole thing, and we generally insisted that the contract between the United Mine Workers of America and the Operators was a contract that had the right to be complied with and not disturbed. We waited for some time and still the Monroe case was not closed, but on the occasion of the visit with Mr. Houck, there was an implication, at least, that the case would be closed up in accordance with the contract.

Q. 93. That implication coming from whom?

A. Mr. Mertha and Mr. Wiseman, the two attorneys for the Wage and Hour Division. We went home and waited for some time, and in the middle of June, the case was not closed, and Mr. J. D. A. Morrow, who was President of the Pittsburgh Coal Company at that time, called me on the telephone and told me that this matter had again come out front in Pittsburgh and that investigators were calling

at certain mines out there, and that a delegation of Western Pennsylvania coal operators had called at the Philadelphia Office and they came away with the distinct impression that there would be forthcoming from that Regional Office a finding that travel time should be paid for under the Wage and Hour Act, and I said, "Well, what can we do about it, we haven't got our case closed?", and he said we ought to reassemble the Appalachian Conference, or at least get a representative group of the operators from the Appalachian Conference to go to Washington and see whether or not we could get the United Mine Workers and ourselves in strong enough position to compel attention at the Wage and Hour Division. I agreed that we ought to do that. I tried to make an appointment with the United Mine Workers, and at this time it seemed that Mr. Houck was more or less representing the Union in this matter, and I think he was in Kentucky, I had a telegram from him down there, and he said he couldn't be back until a certain date. We arranged to call at the United [fol. 174] Mine Worker office on this date, which was about the latter part of June or the first of July, 1940.

Q. 94. Who were "we"?

A. The operators who were present were Mr. J. D. A. Morrow, Mr. Cowan, Vice-President of the Monroe Coal Mining Company, and myself. We met in Mr. Lewis' office and there were present Mr. Lewis, Mr. Houck, Mr. Willie Hopkins, who had then just been appointed at that time as General Counsel for the United Mine Workers, and I think Mr. Van Bittner was there, and several other people whose names I do not now recall. We discussed this thing for probably an hour before Mr. Lewis had to leave for a train, and he said he was going to leave the matter in the hands of Mr. Houck and Mr. Hopkins, and said we ought to go down and see Mr. Mertha and Wiseman again. I think it was Mr. Morrow who said that he was tired working with the underlings, and this thing had to go to General Fleming, then Colonel Fleming, who was then head of the Administration, if we were going to get any action on it. Mr. Lewis suggested that we make an appointment with Co-. Fleming, and we said we didn't know Col. Fleming. My recollection is that Mr. Lewis made the appointment for us himself, and we departed and went to Col. Fleming's office at the appointed time. My recol-

lection is we left the United Mine Workers office almost immediately and went to Col. Fleming's office.

Q. 95. Who was in that group?

A. Mr. Morrow, Mr. Cowan, Mr. Hopkins, Mr. Houck and myself. We had an interview with Col. Fleming and he indicated that if in this long period of collective bargaining in the mining industry that that was the basis upon which payment for work was agreed on, that there wasn't any reason why he should wish to disturb it. He said that he felt that a bona fide arrangement of that kind [fol. 175] of history of fifty years, certainly ought not be disturbed, particularly after the description we had given him of the disturbance that would be occasioned in the industry by any such revolutionary change in its wage structure. He referred us to an attorney for the Wage and Hour Division at Philadelphia, Mr. W. R. Gallagher, who wrote the memorandum about February 24th, and said that we should go over there and make a statement of policy as to what was involved in this matter,——

Q. 96. A statement of policy or of fact?

A. A statement of fact that could be the basis of the policy for the administration of the Act in the bituminous coal industry. Mr. Cowan and I left that conference and went to Philadelphia. We went to the Wage and Hour Division and met Mr. Gallagher and Mr. Dorsey. We arranged for a conference of the operators and the United Mine Workers on July 9th.

Q. 97. I don't believe I know who Mr. Dorsey was.

A. Mr. Dorsey was the Administrator of the Office of the Wage and Hour Division in Philadelphia. He was the chief officer of the Government in that Office.

Q. 98. And Mr. Gallagher was his counsel?

A. Was his counsel. We arranged to meet in Philadelphia at our offices, 1617 Pennsylvania Boulevard, on July 9th. In order to have a representative group of the operators present, I arranged to have the Negotiating Committee of that Conference present.

Q. 99. What conference?

A. The Appalachian Conference, plus the Chairman of the Appalachian Conference.

Q. 100. You mean the group of operators who had constituted the sub-committee of the Conference at the 1939 Wage Conference?

A. At the 1939 Wage Conference. That comprised Mr. [fol. 176] Walter Robinson, who was the president of the Youghiogheny and Ohio Coal Company, and was Chairman of that Conference, who has since passed away. It was—the Committee was Mr. L. T. Putnam, of Beckley, West Virginia, Mr. L. C. Gunter of Knoxville, Tennessee, Mr. J. D. A. Morrow of the Pittsburgh Coal Company, and myself. Mr. Earl S. Houck came to the conference for the United Mine Workers of America. We called at the Wage and Hour Division, had a conference with Mr. Dorsey and Mr. Gallagher, and they suggested that each of us go back and write a letter, in which the facts surrounding the payment for work time in the mining industry would be presented clearly to the Administration. We suggested that if that was the case, that we write a joint letter, and would a joint letter serve the purpose better. They said, of course, if you can agree on a joint letter, it will serve the purpose much better. We then returned to our office and composed a letter, at which composition there was present the committee of operators I have just named, Mr. Houck for the United Mine Workers of America, Mr. Fred Knight, the attorney for the Monroe Coal Mining Company, from Morgan, Bockius and Lewis' office at Philadelphia, Mr. C. E. Cowan, the vice-president of the Monroe Coal Mining Company; and after we had composed our first draft of this letter we asked Mr. Gallagher to come over and examine the letter to see if it covered all the points that he thought ought to be in such a letter. Mr. Gallagher came over and spent some time with us, suggested some changes in the composition of the letter, which were agreed to, after which time the letter was completed, all of us signing the letter, and it was delivered to the Wage and Hour Division the next morning by Mr. Knight, copies being sent to,—a signed copy being sent to Mr. Houck, a signed copy being sent to Mr. Walter L. Robinson, who was Chairman of the Appalachian Conference, and copies furnished to Mr. Morrow, Mr. Putnam, Mr. Gunter and myself.

[fol. 177] Q. 101. When you said all of us signed, you meant just the Scale Committee and Mr. Houck.

A. That's right, representatives of the miners and operators signed.

Q. 102. Mr. O'Neill, I hand you a copy, which, if Your Honor please, has been submitted to counsel and authenti-

cated, of a letter, and ask you if that is a copy of the letter which was composed and signed, as you have just stated.

At this point, a recess for the period of fifteen minutes was taken, after which the examination of this witness was resumed.

Q. 103. I had just handed you a letter, Mr. O'Neill.

A. This is a copy of the letter that we composed and submitted to the Wage and Hour Administration in Philadelphia on July 9th, 1940.

By Mr. Richardson: We wish now to file this letter as an exhibit.

By the Court: Over the same objection the letter may be admitted in evidence upon the same conditions as previous documents.

The letter referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 19," and is returned as a part of this transcript.

Q. 104. Mr. O'Neill, did that letter express the concensus of that group?

A. It was the act of the entire group and they all signed it, the people who were there representing the Appalachian coal operators and the United Mine Workers.

Q. 105. And did it also reflect the concensus of the group which you referred to in Mr. Lewis' office just before the appointment was made with Col. Fleming?

[fol. 178] A. I would say that it did. In other words, I can say in fairness that the United Mine Workers took the same position on this matter throughout as the operators did.

Q. 106. That letter was in response to the suggestion, I believe you have stated, that you gentlemen together give a statement of facts around which a policy might be formed. This is essentially a statement of fact, is it not?

A. That's right. That's what it is.

Q. 107. Were those facts within the knowledge of yourself and the other persons subscribing the letter.

A. I am quite sure of that.

Q. 108. And the facts stated were accurately stated?

A. That's right.

Q. 109. Would you subscribe to the same statements today?

A. I would.

Q. 110. Nothing in the subsequent experience has persuaded you that any of you were at all in error in your statements included in that letter?

A. As to the statements contained in that letter, as to results that might follow from the application of payment for travel time on the basis of the demands made by the United Mine Workers of America at New York, and which amounted to $2.25 per day on the basis of ninety minutes of travel time, the facts stated in that letter would be just what is stated there, would produce industrial chaos in this industry and even on the proposition presented by the War Labor Board, implemented by the Ickes-Lewis Agreement, which has been put into effect at many mines throughout the country now,—in fact is supposed to be in effect at all mines now,—the confusion resulting from the application of an assumed forty-five minutes travel time fixed by the War Labor Board in its recent decision in the case of the Illinois Coal Operators Association and the [fol. 179] United Mine Workers of America Agreement, this confusion has already given evidence at mines by a misunderstanding, by the changes being made in the wage structure. For instance, a locomotive runner with a basic pay of $7.00, transports men from the outside to the inside and then transports them from the inside back outside in the evening, at a mine where his extra work was one hour and a half for these two man-trips, morning and evening, received under the old wage scale eight hours and a half at time and a half for the last hour and a half, which gave him about $9.25 a day. Under this rule of travel time, this man who is running the man-trip locomotive receives $8.50 for eight hours and forty-five minutes, and has received a reduction in wages while he is transporting other locomotive runners to the inside of the mine, who are paid for traveling with him. That's one confusion that has already arisen in the mines, and several local strikes have occurred by the refusal of the man-trip locomotive runner to carry, take this trip, because he figures he is not entitled to a reduction in wages when everybody else in the mine is getting an increase in wages. There is already evidence of what we stated in the letter, that the entire competitive situation between mines and between districts is being radically changed. A mine that has a fifteen minute travel time, under this agreement, is supposed to get eight hours and

thirty minutes work time at the face. A mine that has an hour and forty-five minutes travel time will only get seven hours productive time at the face, the forty-five minutes being merely a method of computation, but the underground time is fixed at nine hours, including a fifteen minute lunch period, and the longer the travel time is, as stated in this letter, the less productive time is going to be gotten for the same pay at the face. This will radically change the conditions of cost of production between long travel time mines and short travel time mines, and under the stress of competitive conditions, is bound to result in complete [fol. 180] chaos as to the ability of these neighboring mines to compete with each other. This wage scale has been predicated throughout the years upon the basis of trying to preserve—(1) a reasonably competitive condition as between mines within districts, and (2), to give the same amount of work opportunity for earning to the mine workers themselves, so in the exercise of the day's work they would get the same yield of production as the miner in the next mine from them. The confusion that is going to result from overtime on hours in excess of forty at half rate pay as compared with miners at full time rate and time and a half for his excess work over forty hours is going to become very, very bad. The next thing this wage scale has been predicated on, as I know it, is a disposition and a policy up to this time, on the part of the United Mine Workers, to bring about, as nearly as possible, taking into consideration differences in natural conditions and locations and all that, a uniformity of wage schedules. In fact, the 1941 Conference divided the operators in the north and south on that one issue, that the differential in the basic day rates between the north and the south should be eliminated, and they should be paid the same wage in the south as in the north for the same task performed. This condition that we are getting into here now is going to change the relationship between mines, between districts, and the whole competitive situation that we have had in this industry for fifty years is being revolutionized by this thing called portal to portal pay, and it is being done, in my opinion, without consideration of its consequences at all, or perhaps, may I say with a recklessness that shouldn't be in an industry like this at a time like this. I think that every statement contained in the letter will be proven to be correct, under the War Labor Board's decision, in a

very short time. I think the industry and the United Mine Workers will, as competitive conditions return, have to back away from this portal to portal thing in order to insure the [fol. 181] maintenance of competition between operators and to insure maintenance of work for their own people. That's just my opinion, but that's what I think.

Q. 111. What do you think would be the effect that you have just described upon the opportunities of the men themselves within the mines to enjoy equal opportunity for earning?

A. Well, that depends upon the schedule itself and the application of portal to portal payment. Portal to portal payment is a working condition and for travel time, as such, could within reasonable limitations perhaps equalize earnings. Travel time as required by the Fair Labor Standards Act, and particularly on an assumed forty-five minutes travel time, is going to bring about wide differentials in earnings of mine workers.

Q. 112. You mean travel time if required by the Wage and Hour Act?

A. Yes.

Q. 113. To illustrate that, the piece workers in a mine having long travel time would have less opportunity for productive work, and therefore, would have less earnings?

A. Less opportunity for productive work and earnings on full time rate as compared with rate and a half after forty hours.

Q. 114. Was a reply to this letter which you have described and introduced in evidence received from Col. Fleming?

A. Yes, there was a reply received. I think the reply was dated July 18th, 1940.

Q. 115. I hand you, Mr. O'Neill, a copy of a letter dated July 18th, 1940, addressed to Earl E. Houck, Esq., and signed by Philip B. Fleming, Administrator, and ask you if that is a copy of the reply?

A. This is a copy of the reply received from Col. Fleming.

By Mr. Richardson: We wish to file this as Exhibit No. 20.

[fol. 182] By the Court: Let the document be admitted over the same objection upon the same conditions.

The letter referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 20", and is returned as a part of this transcript.

Q. 116. What became of the Monroe Mining Company case following the dispatch of this letter and receipt of this answer?

A. After the receipt of this letter, Monroe Coal Company was advised through Mr. Gallagher that they had formally closed the Monroe Coal Mining Company case in accordance with this policy of the administration.

Q. 117. Mr. Gallagher was speaking for the Wage and Hour Division?

A. He was its counsel.

Q. 118. And I believe you said you are a director of the Monroe Coal Mining Company?

A. That's right.

Q. 119. You referred a moment ago, Mr. O'Neill, to present confusion. You had in mind and referred, did you not, to the confusion consequent to the agreement that was made November 3, 1943?

A. That confusion is made up of two things. In the first place, you must understand that the Coal Mines Administrator, Secretary Ickes, has not yet or had not until last night put the regulations for the computation of the elements that are contained in the War Labor Board's decision on the Ickes-Lewis Agreement. In other words, the mines are not able, or were not able until last night, to begin the computation of their payrolls for the next payday which will happen around the 23rd or 24th, just before Thanksgiving, and unless that goes out, there is going to be terrible confusion at the mines on next payday. The second thing is that in cases just as I have mentioned, there has been confusion at the mines by the mine workers, with [fol. 183] men such as I have indicated receiving, in effect, under the terms of the agreement as now understood, a reduction in wages instead of an increase in wages. The results to follow further than that will have to come out of the application of the regulations issued by the Secretary of the Interior, which have not yet been made public.

Q. 120. The thing I want to clarify, as I understand your statement, this confusion and all these things stem from a shift from a face to face to a portal to portal arrangement, effected by the Ickes-Lewis agreement of November 3rd?

A. That's right.

Q. 121. Do you recall whether, in July, 1940, following this exchange of letters you have described, there was a public declaration of policy by the Wage and Hour Administrator?

A. There was a press release, I have forgotten the date, which made public substantially the contents of his letter of July 18th.

By Mr. Richardson: We here offer in evidence a press release of Saturday, July 27, 1940, under the heading of "Two Mining Determinations Announced".

By Col. Harris: In addition to the objections heretofore interposed, we want to add to those objections, this: It is res inter alios actor, which may not appeal to Your Honor's judgment, and I also want to say a good deal of it is hearsay.

By the Court: The objection to this document will be overruled and it will be admitted on the same conditions as the documents heretofore offered.

By Mr. Richardson: There is an element in that I should like to clarify. This document has been authenticated as a true copy of a press release by the Director of the Wage and Hour Division. Now, the suggestion that it would not be admissible under the res inter alios actor rule makes me wonder who else they have in mind as having anything to do with this. I am offering it as a public document, the correct text of which has been authenticated.

[fol. 184] By the Court: The authenticity is admitted?

By Mr. Richardson: Yes, sir.

By the Court: All right, let it be admitted.

The document referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 21", and is returned as a part of this transcript.

Q. 122. Mr. O'Neill, did you take part in the 1941 Wage Conference?

A. Yes, sir.

Q. 123. In what capacity?

A. As a member of the Wage Committee and also as a member of the Sub-Scale Committee.

Q. 124. Who were the members of that Sub-scale Committee?

A. In 1941, the members of the Committee were Mr. J. B. Morrow who succeeded Mr. J. A. D. Morrow as President

of the Pittsburgh Coal Company, and myself, from the North, and Mr. Lee Gunter of Knoxville, Tennessee, and Mr. L. T. Putnam, of Beckley, West Virginia, who represented the South. Mr. Ezra Van Horn, of Cleveland, Ohio, was Chairman of the Conference.

Q. 125. Who represented the Mine Workers?

A. Well, the United Mine Workers Sub-scale Committee was very changeable. In other words, they put many different people into the Sub-scale committee from time to time. The principal members of the Committee, of course, were Mr. John L. Lewis, Major Tetlow, Thomas Kennedy and Mr. John Owen.

Q. 126. Was that, by the way, the same Major Tetlow who served as a member of the Bituminous Coal Commission?

A. That's the same person.

Q. 127. Was there any shift at the 1941 Wage Conference from the position taken at the time of writing the letter [fol. 185] which you have introduced in evidence, Plaintiff's Exhibit No. 19?

A. No,—as to the demands of the United Mine Workers?

Q. 128. Yes, sir.

A. There was not.

Q. 129. Was there any demand on that occasion by the Mine Workers that they be paid for travel time as such?

A. No, their demand, as I recall it, was for the six hour day.

Q. 130. But no demand that they depart from the established and traditional practices of determining that day on the face to face basis?

A. Not as I recall at all.

Q. 131. At that time, the entire industry throughout the United States was operating on a face to face basis?

A. That's correct.

Q. 132. And continued so down to these recent days in this month?

A. Yes, down to November 3rd.

Q. 133. And before the change was effected in this month, the Government had seized the coal mines, had it not?

A. That's correct.

Q. 134. I mean the Federal Government.

A. Yes, the Federal Government seized the mines, I think November 1st.

Q. 135. And thereafter, on November 3rd, the Secretary of the Interior, acting for the Government, made this ar-

rangement with the United Mine Workers which you say has produced the confusing consequences described?

A. That is correct.

Q. 136. There is no agreement on the part of the operators that this change in the basis of determining the work day be made?

[fol. 186] A. There was an agreement made by the Illinois Coal Operators Association and the United Mine Workers of America, which included, which established an eight hour and a half day at straight time rates with payment of travel time for hours in excess of forty a week. That agreement was submitted to the War Labor Board at a public hearing and the Board denied the agreement as it was written and changed it from an eight hour and a half day at straight time rates, amending the seven hour basic day in the industry, with an assumed travel time of forty-five minutes and permitting the working of one hour theoretically at time and a half at the seven hour rate, which computed, means $8.50 a day for eight hours and forty-five minutes, excluding a fifteen minute lunch period.

Q. 137. Has there been any agreement on the part of the mine owners and operators throughout the Appalachian area that this determination of the work day be shifted from a face to face basis?

A. There has been no agreement consummated in the Appalachian area, although the miners and operators began a meeting on yesterday to try to work out an agreement, and I understand they are in conference again today at eleven o'clock.

Q. 138. They were asked to do so by the Secretary of the Interior?

A. That's correct.

Q. 139. And they are conferring now, shall I say, under duress of present circumstances?

The defendants, by counsel, objected to the foregoing question, which objection the Court overruled.

A. I would say they are meeting now in response to a request by the Secretary of the Interior to try to see if they can make an agreement with the United Mine Workers that would provide them with a basis of work that they could secure a return of the mines to private control.

[fol. 187] Q. 140. Mr. O'Neill did you attend the conference on yesterday?

A. Yes, I did.

Q. 141. The plaintiff corporation here, Jewell Ridge Coal Corporation, was not represented in that meeting, was it?

A. Jewell Ridge Coal Company was not present, and the Southern Coal Producers Association was not present. I don't know whether they are represented directly by the Southern Coal Producers Association or not. If they are, they were not present, directly or indirectly.

Q. 142. The Southern Coal Producers Association was not represented in the conference to which you refer?

A. That's right.

Q. 143. And you know its representative, Senator E. R. Burke, is here present today in this courtroom and therefore, not participating in the conference which you say is in progress today?

A. That is correct. I don't know whether his negotiating committee is in today or not. Yesterday, they were not present.

Q. 144. You have said there was no agreement on the part of the Mine Workers and operators throughout the Appalachian area about this change from a face to face basis of determining the work day, and am I correct in the conclusion from your testimony that the reason for that is the fact that they feel these consequences you have described would result from such a shift?

A. That is correct, unless there is an equalization of face to face time which this does not provide.

Q. 145. Did you participate, Mr. O'Neill, in the 1943 Wage Conference?

A. Yes, I have participated in those conferences since March 10th down to date and there has been so many different conferences that I don't know how to explain this without taking up a lot of time. There have been a number [fol. 188] of different conferences, some of which I participated in and some of which I did not. That came about through the division of the North and the South as to conferences, they conducting their conference separate from the north. I did not participate in the Southern conferences in any way. Later, by reason of a disagreement between the operators in my district and the other operators in the north, we disassociated ourselves from the Northern Appalachian Conference and conducted negotiations on our own behalf.

Q. 146. You did, though, participate in the General Wage Conference beginning March 10th, 1943?

A. That is correct.

Q. 147. On that occasion, I believe the United Mine Workers presented a demand that to conform with the basic and legal requirements for the industry, the maximum hours and working time provisions be amended to establish portal to portal or starting and quitting time for all underground workers?

A. That is correct.

Q. 148. Did the Mine Workers at the same time present a demand for increased pay?

A. They demanded an increase of pay in the basic rate of $2.00 per day, which carried with it a statement that that would include payment for portal to portal, as I recall it. I forget just the exact words, but it was a straight increase on the base rates and I have forgotten the exact wording of that particular demand.

Q. 149. Now, at the time that these demands were presented, had there been a decision by the United States District Court in the Northern District of Alabama, on the travel time issue in the iron ore case?

A. Yes, I learned that by attendance at the conference. I didn't know it until that time.

[fol. 189] Q. 150. And that decision had been that the travel time in the iron ore mine should be included in the work week?

A. That's correct.

Q. 151. I wish you would state whether or not the Mine Workers in asserting the demand for the portal to portal basis, made it clear that it was their intention to conform their status to the finding of the Court in that case?

A. That was my understanding of their position throughout the conferences. The demand for $2.00 per day, in my opinion, as I judged the situation, was their principal demand and the one upon which they placed emphasis.

Q. 152. Were the operators willing to agree with them upon the wage increase?

A. Well, the operators did not agree on any wage increase.

Q. 153. Was there a reason assigned why they did not?

A. The operators' position was that the policy of the Administration, as established by the War Labor Board, under what is called the Little Steel Formula, prohibits a

wage increase as such, because the Mine Workers had received, in 1941, more than the fifteen per cent granted by the Little Steel Formula. I think the figure used by the Government and by the Mine Workers and operators was 18.1% increase in 1941.

Q. 154. In consequence of that, there was no agreement between the Mine Workers and the Mine Operators as to the requested increase in pay?

A. That is correct.

Q. 155. And, as I understand you, the reason assigned for that lack of agreement on the part of the Operators was that it would violate the Government's stabilization program?

A. That is right.

[fol. 190] Q. 156. In the course of these conferences, was there announced a decision by the Circuit Court of Appeals of the Fifth Circuit, in the Alabama Iron Ore case?

A. Yes. I forget the exact date but we learned about it around March 16th or 17th.

Q. 157. I believe that decision was announced on the 16th, if I remember correctly, and you learned about it about that time?

A. It wasn't long getting into the Council Room. I don't know who brought it in but it got there very quickly.

Q. 158. Concurrent with the declination of the Operators to agree to the requested wage increase, and the announcement of this decision, was there a shift in emphasis on the part of the Mine Workers in their demands?

A. Well, I would say there was a very decided shift in emphasis when the Circuit Court made its decision.

Q. 159. I wish you would describe that and explain to the Court just what you mean.

A. Well, up to that time, these negotiations had been conducted largely around the demand for an increase in wages of $2.00 per day, the Operators asserting their position that the Little Steel Formula prohibited such action. Portal to portal had only been a matter of meeting some legal requirement up to that time. When it became effective, I suppose,—well when the United Mine Workers got word that the Court of Appeals had rendered this decision, they immediately transferred their pressure for a settlement from the $2.00 a day issue to the payment of $2.25 a day for portal to portal, based upon time and a half over seven

hours for ninety minutes of travel time, which they asserted to be the correct measure of travel time in the Appalachian area as a result of investigations that they themselves had conducted through their various local Unions throughout the [fol. 191] area in the various mines, and the operators, of course, were, if anything more reluctant to consider the portal to portal payment than they would have been to consider a straight wage increase,—at least, that was my position in the conference.

Q. 160. Was there any suggestion, or did you draw any inference that the emphasis upon the portal to portal demands were addressed to getting from these operators an agreement upon the wage increase, as requested?

A. Well, I can't say what motivated the leadership of the United Mine Workers. I can only say that as far as I am concerned, I suggested that so far as the presentation of the demand in the form it was presented to us, it was a very substantial wage increase, away beyond any requirement, perhaps, of the Fair Labor Standards Act, and had very little relation to the requirements of the law, as we understood it. In other words, the demand of the United Mine Workers, transferred to portal to portal, as I understood it, was that it was a demand to change the working condition for a certain amount of pay asi le from any requirements of the Act.

Q. 161. Then, as I understand you, the whole thing was addressed towards getting more pay?

A. Well, I don't know whether the whole thing was or not. That's a legal question, but the amount requested by the United Mine Workers and the manner of its application was a wage increase, as I understand the requirements of the Act. In other words, they wanted time and a half for travel time as such on each day, with a thirty-five hour week, in effect without a credit for the five hours between thirty-five and forty, as required by the Act, and payment for travel time as such on each day of the week instead of payment of an additional half rate for hours worked in excess of forty as required by the Act.

[fol. 192] Q. 162. Did you or did the operators whom you represent have any accurate data on the travel time throughout the Appalachian area?

A. Well, there were surveys made by the different districts. How accurate they were depends entirely, I sup-

pose, upon the intelligence of the man who made it. So far as I know, actual studies, and those were in mines with which I am associated, I think the study was made with intelligence and the desire to ascertain the accurate facts.

Q. 163. What would you say as to whether the assumed forty-five minutes of travel time is accurate for application generally throughout the Appalachian area?

A. Well, I don't know, really, where the forty-five minutes comes from. It is clearly stated to be an assumption. In my own district the average travel time was shown to be seventy-three minutes per day in a very, very large and substantial proportion of the mines in that district. The aggregate of the Appalachian area North,—that includes Pennsylvania, Ohio, Northern West Virginia, the Panhandle District of West Virginia, and the State of Maryland, was shown to be about eighty-two minutes.

Q. 164. What can you say as to the necessity for adopting or assuming some definite figure for travel time in order to maintain that indispensable competitive equality that you have described?

A. Well, my position throughout the conferences has been —and many people differed with me, that the same face time was essential to maintain competitive relationships in the industry after this maximum demand occasioned by war production has fallen to a normal status of the country's requirements, which will be substantially less and has been substantially less than the six hundred million tons that the Government now requires for 1943 and the six hundred and twenty to six hundred and forty million tons that the Government estimates it will require for 1944.

[fol. 193] Q. 165. Then, if I understand you, and somewhat summarizing, if you do not assume a travel time factor uniform throughout the contracts, but proceed upon the basis of paying for the actual travel time in each separate mine, there would result these inequalities and dislocations that you have previously described?

A. If you put it on an assumed basis, it will have the effect of giving longer work time in one mine than another. If you put it on the basis of equalizing the hours at the face, the compensation required to be paid by the mine with long travel time will be greater in dollars and cents than the mine with the short travel time.

Cross-examination.

By Col. Harris:

Q. 1. Mr. O'Neill, how old were you when you went to work in the mines?

A. Twelve years old.

Q. 2. They don't allow twelve year old boys in the mines any more, do they?

A. No, in Pennsylvania, it is now eighteen; and in effect, under workmen's compensation laws and double indemnity and so forth, it has practically made it twenty-one underground.

Q. 3. When you went in at the age of twelve—was that in 1898?

A. That's right.

Q. 4. How many hours per day or per shift did coal miners stay underground when you first went to work in the mines?

A. Well, at that time, Colonel, the hours were very, very long.

Q. 5. Can you give us approximately what they were, Mr. O'Neill?

A. Well, it was officially a ten hour day but I think it [fol. 194] really was eleven hours of twelve hours, whatever you could get cars to load. Times were very bad.

Q. 6. You mean eleven hours at the face or eleven hours from portal to portal.

A. Well, the company men,—what I mean by that, the men employed by the hour, or the day, worked from ten to eleven hours at their daily tasks. The mine worker, of course, has always worked his hours and come out at different times of the day, but usually, not less than ten hours at the face.

Q. 7. And taking the figure of eighty-three minutes of travel time, that would mean that on that basis a Mine Worker would be underground eleven hours and twenty-three minutes.

A. That's about right.

Q. 8. Now, then, during the course of those forty-four years since you have been in the coal mining business, the Mine Workers have steadily worked to lessen those long hours of toil, haven't they?

A. The majority, I think,—let's say this: that the Miners Union has always, as a matter of policy, supported what is

known or used to be known or used to be called, when I was a boy, the short hour movement. The Central Competitive Field was successful in establishing the eight hour day on April 1, 1898. That became effective in those mines that were Unionized at that time in Ohio, Western Pennsylvania, Illinois and Indiana, and as the Union's influence extended, the eight hour day went with it. And the Union's influence was lessened, the eight hour day became more or less violated by the necessities of competition or the decision of the operating coal company.

By Col. Harris: If the Court please, in order to make myself clear, a great deal of historical background that has gone in, was in our position, objectionable, but we will [fol. 195] want to bring out in that historical background things that, if the Court is going to let them in, should be brought before the Court.

By the Court: Do you want to cross examine without waiving your objections?

By Col. Harris: That's my point.

By the Court: Proceed so to do.

Q. 9. So, through the years, we can summarize by saying that the United Mine Workers, the International Union of the United Mine Workers of America, have tried to get shorter hours of work, both per day and per week, haven't they? They have shortened the work week from six days to five days?

A. Since April 1, 1898, they have supported, or did support, without question, an eight hour day as such, until, I believe, about 1919 and then the United Mine Workers of America, at their Convention in Indianapolis, I believe, in that year, decided to forward, or shorten the work day, if they could, to six hours.

Q. 10. Now, during these years that the United Mine Workers have been operating as a Union, the method of dealing has been for the great coal operators on one hand and the representatives of the International Union of the United Mine Workers of America on the other hand, to get together around a table every two years and start horse-trading for all they were worth, hasn't it?

A. Well, first, I don't think we are great. Horse-trading is a term that's used to—I don't know whether it is to frown upon or cast a doubt upon efforts to negotiate an agreement based upon the then existing and so far as foresight can be

good judgment, the economic conditions that are in front of the industry at that time. That's my conception of the "around the table" business.

[fol. 196] Q. 11. In using the term "horse-trading", I didn't mean any dishonest implications. What I meant was the representatives of the operators and the miners would get together and make proposals and counter-proposals and withdraw one and put in another so that the working out of a contract was usually the result of a long period of trading, wasn't it?

A. Sometimes long, sometimes short, but it is like any other kind of negotiating of that character, where both parties are free agents, that the first part of any conference of that kind is an attempt to clarify what the real issues are, and the real issues are clarified in men's minds not by withdrawal of any particular demand, but by the emphasis put on it across the table, and you finally do, by deduction, reach a conclusion there are one or two or three issues that are important and you devote your time to trying to straighten them out.

Q. 12. How long, ordinarily, do these negotiations preliminary to a contract, how long do they last?

A. Well, some times they have been several weeks. In 1935, I think our negotiations—which is the longest period recently, except this one—extended from April 1 to about September 26 that year. The contract was made effective October 1, 1935. That has been the longest period since these negotiations began. The first and most important Appalachian contract, and the one which established the basis of wages in the whole industry since that time, which restored the Union to its former and even greater strength throughout the country, was negotiated between July 3rd and July 26th.

Q. 13. Now, during this history of collective bargaining, the policy of the operators has been to resist the effort of the miners to get a shorter work day and a shorter work week, hasn't it?

A. I would say quite generally that is true although many [fol. 197] operators have not been in favor of a long work day as such. I think the eight hour day was more generally and more generously accepted in the mining industry and I think it was probably the first big industry in the United States that did accept the eight hour day.

Q. 14. In addition to shorter hours, the United Mine Workers of America have from time to time sought to get increases in wages and wage scales and wage rates, haven't they?

A. Oh, yes, that's true.

Q. 15. And the policy of the operators in these negotiations, the general policy over the years, has been to resist these increases in wage rates?

A. Subject to what I have said to you before, Colonel, that is true. During the period of the clarification of issues, of course everybody asserts everything and everybody opposes everything. There are times when the operators enter negotiations when they know and are quite convinced that there is a requirement for a wage increase. It's an attempt to get to the measure of it.

Q. 16. Now, in addition to those claims, the miners, during these years, have sought improvements in their working conditions?

A. That is true.

Q. 17. For instance, when you went in the mines forty-four years ago, there was a great deal of dead work done by miners that they didn't get paid for, and for which they do get pay today, wasn't there?

A. That's correct.

Q. 18. Would you explain to the Court what dead work is?

A. Much of the dead work, and dead work as a term means work that is not productive, such as the cleaning up of a fall or the re-timbering of a place where the timber has gotten bad and you have to remove it and put in new timber, the cleaning out of debris in a pillar that's been allowed to [fol. 198] stand, so it can be put back in shape, the taking out of pillars that are about to cave in, and all that. It's generic term, Colonel, and means work which is not productive.

Q. 19. And during the course of the years, lots and lots of that has been done by the miners without pay?

A. I would say that's a fair statement.

Q. 20. Now, then, in the old days when you went to work in the mine and the miner was producing coal on a tonnage basis, and the coal came out to the tipple and was weighed, he had no voice, no method of finding out whether he got paid for the coal he actually produced, did he?

A. Colonel, in Pennsylvania, we have had a check weighman law since 1887,—that's when I was born.

Q. 21. That wasn't true generally throughout the United States, was it?

A. Well, my understanding is Pennsylvania was probably one of the first states that had that law. The difficulty we had was that in many places the men did not like to pay a check weighman on the tipple.

Q. 22. That was in Pennsylvania?

A. Yes.

Q. 23. But the United Mine Workers, as an improvement in the working conditions of the men, has uniformly followed a policy of insisting on a check weighman at the mines?

A. That is correct.

Q. 24. In the old days when men were injured, in most of the mines they had no voice in selecting the doctor who would treat them or the hospital to which they would go, did they?

A. Well, I can't tell you about that. In many cases, there was no doctor, as such, for the miners. In the old days, he had to get his own medical attention and pay for it. [fol. 199] The system of a doctor in a mining community came about as a result of the necessity of maintaining a doctor in a small community and that has been worked out in various ways by the mine workers and the coal companies, just the same as hospitalization and hospital maintenance and hospital construction has had to be worked out by mutual contributions of the miners and the operators, as a public necessity and a community enterprise, just like it is done every where else.

Q. 25. And in addition to that, the Mine Workers have uniformly worked to increase the element of safety in the mines, haven't they, so that you now have mine inspectors far more generally throughout the industry than they had when you began working?

A. I will say that is mutual. I think the whole industry had tried to promote safety in coal mining. The fact of the matter is, so far as I know, there hasn't been a bituminous coal mining code in Pennsylvania since 1916 that hasn't been worked out jointly by the operators and the miners and submitted to the legislature and agreed to.

Q. 26. Did you ever have the experience, while you were a miner, that when you went to get your pay, instead of getting paid in money you were paid in scrip? Did you ever have that?

A. There has never been scrip used in my state.

Q. 27. You are familiar with scrip, aren't you?

A. I know what it is, but the Pennsylvania laws have always forbidden the use of scrip, not only in the mining industry but in other industries.

Q. 28. You know that in a great many coal mines throughout the industry, the men were paid off in scrip, don't you?

A. Yes, I have learned that as you learn anything else of that kind.

[fol. 200] Q. 29. And the Mine Workers have consistently fought that method of payment, haven't they?

A. I don't know how consistent it has been, Colonel, but there has been in the last few years a very strenuous effort made by the United Mine Workers to abolish the use of scrip, and it was finally written into an agreement in New York,—I can't recall which one.

Q. 30. They have also urged the right of the miners to trade where they please and that they should not be compelled to trade at Company stores, haven't they?

A. I don't know of any compulsion to trade at Company stores. The only compulsion I know to trade at company stores has been economic necessity for the extension of credit. In Pennsylvania, there is a law prohibiting a coal company from owning a store, and that's been on the books for years and years and years.

Q. 31. That's not generally the law throughout the coal producing area of the United States, though, is it?

A. I think it covers a great area.

Q. 32. Now, in the early days, when you went to work in the coal mine, did the miners furnish their own tools and their own safety equipment?

A. Well, those men that were referred to as contract miners, and by contract miners I mean men that worked by the ton or the yard or the foot, depending on the character of the work he is doing, furnished their own equipment. The day workers and hourly workers were always furnished their own tools, and that lasted right up until now. The theory of that was that a skilled miner in the old days,—and in the old days, a miner was a skilled workman,—I am not so impressed by his necessity for great skill today,—that may be because when I worked there you had to be more skilled than you do now, machinery and [fol. 201] mechanization and application of power has re-

duced greatly the use for the tools the miner had to carry. If you had a rock tunnel to shoot, you made a deal with some good number of miners to put that through for you and they had their own tools and equipment. Just like now, if you are going to build a road from your house to the public highway, you wouldn't buy the equipment. You would make a contract with some man to build it for you and he would bring the equipment to do the job, and the rental of the equipment is probably in what you pay for that job.

Q. 33. But today, generally speaking, throughout the coal mining industry, the cost of tools and equipment is borne by the Company rather than the miner, isn't it?

A. The cost of tools for the tonnage, footage and yardage workers was granted by the War Labor Board in its directive of May 28, 1943, and I wish to add to that that the United Mine Workers did not ask for the furnishing of these tools but that was granted by the War Labor Board even without request or attendance by the Mine Workers at the hearing.

Q. 36. How about the cost of blacksmithing? In the old days, that was charged to the miners, wasn't it?

A. That's right. It was charged in various districts. It was a custom when these men owned a large number of different tools and it was expensive equipment necessary to be maintained.

Q. 35. How long ago was that when they owned that large list of tools and it was expensive to maintain the equipment. How many years ago?

A. Well, I would say that that condition existed in a large measure down to the period of the introduction of the shortwall cutting machine in mines. I can't give you that in a basis where I could say when the shortwalls became the general type of cutting machine in the mine. There were machines that succeeded that cutting machine but were never so flexible and productive as the shortwall machine.

[fol. 202] Q. 36. About how many years ago did you say that was?

A. I would say the shortwall machine probably become the important tool in the mines just prior to—I would say around 1914 or '15.

Q. 37. But they kept on making charges for blacksmithing until recent months, didn't they, generally, throughout the industry?

A. Yes, and there has been, I would say, a decline in the rate for dressing those tools and maintaining them since that time, and also, there has been an elimination, by any means, of mine workers that still do require and do own and do use a great variety of tools. That depends upon your natural conditions.

Q. 38. Heretofore, the miners either had to pay for their lights, renting them from the company, or buying them outside, generally, throughout the industry, didn't they?

A. On the same basis as the tools. The day and hourly workers were always furnished their lights and the fuel for illumination until the electric cap lamp came into being, and the electric cap lamp was also furnished—no, the electric cap lamp was rented, that was a rental basis.

Q. 39. I didn't catch what you said about the electric cap lamp.

A. When the electric cap lamp came into operation and was approved by the Bureau of Mines as a safety lamp, safety light, that could be worn in the gaseous mines, it was a patented article and was leased or rented to the coal companies by the manufacturing concern that owned it. That rental was transmitted to the men who used the lights, and that continued until the War Labor Board Directive.

Q. 40. All right. In addition to the miners paying for the light by which they worked, pretty generally they paid for the explosives with which they shot down the coal for the operator, didn't they?

A. And do yet.

[fol. 203] Q. 41. So that, throughout the industry, even today, a miner who uses a stick of Cardox, for instance, in one of the mines involved in this case, they use Cardox that costs 42½¢ for one shot of it, that is no unusual situation in this case to charge them with the cost of that as compared with the other mines throughout the industry, is it?

A. The charge for explosives by tonnage and piece workers is on the principle that within the rate itself, there is compensation for that expense, and there has never been any question about that until very recently. The cost of

the explosives, like the cost of tools, depends naturally on the character of the relation of the man to the company. If he is a contractor, he should supply his equipment and explosives. If he is a day or hourly worker engaged by the company to perform maintenance or service tasks, it should be furnished by the Company.

Q. 42. Now, then, to summarize, Mr. O'Neill, in the forty-four years that you have been in the coal business——

A. There was a little hiatus in there. I was a brakeman once on the railroad.

Q. 43. Well, during the many years that you have been in the coal business——

By the Court: Say the substantial number of years.

Q. 44. During that substantial number of years, there has been a gradual evolutionary process whereby the hours of work, the working conditions surrounding the coal miners of America have improved, hasn't there?

A. Colonel, I would say that that is true, and the improvement to date has been constructive improvement, and there is nobody would like to see constructive improvement continue more so than I. I do not believe that the present situation in the industry is a constructive one. That's my quarrel with it.

[fol. 204] Q. 45. And Mr. O'Neill, you believe, do you not, that if two men are working and one produces ten tons of coal a day and the other produces six tons of coal a day, that the ten ton man should get more pay, don't you?

A. I think that the rate of pay is predicated on the assumption the more units of production you produce the greater your earnings are. That's true in all piece work rate applications.

Q. 46. You don't find any fault with that?

A. No, I don't find any fault with it so long as the dollar a ton that the one miner receives as compared with the dollar the other miner receives has a fair and reasonable relationship, natural conditions taken into consideration. You can't equalize physical conditions between men, however. One man of a certain physical energy and strength will produce ten tons in a place exactly the same as another man of equal energy and strength will produce six tons.

A. And he is entitled to pay for the ten tons, four tons more than the man who produces six under the same identical conditions?

A. That is correct when you have got a piece-work system.

Q. 48. Now, then, where men are working by the hour, is it your idea that the man who works ten hours a day is entitled to more pay than the man who works eight hours a day?

A. I think that's self-evident.

Q. 49. Now, then, if one man has to spend two hours a day in travel time and the other man has to spend only thirty minutes a day in travel time, don't you think from the standpoint of the men, that equity and good conscience require that that difference be taken into account?

A. Why, Colonel, I do not think so at all. In the first [fol. 205] place, I don't think traveling is work. Because I elect to live in Scarsdale, New York, and take the 8:22 every morning and catch the 5:46 every night isn't any reason why my salary should be raised above the fellow who lives in the apartment house right across the street from the Greybar Building.

Q. 50. Yes, but you recognize there are many differences between the way you travel from Scarsdale to your office and the way a miner travels underground under the supervision of the operator, don't you?

A. I have traveled both ways.

Q. 51. And you see no difference in riding from Scarsdale and riding underground?

A. There isn't any more difference relatively than to try to stand up in a coach train from New York to Washington and you sitting in your comfortable seat in a Pullman. It's the same idea. You can't run Pullman trains in a coal mine, but there isn't any more discomfort in a ride in a trip of mine cars at the rate of six miles an hour than there is sitting in that chair.

Q. 52. You don't think they stick to that rate of six miles an hour, do you?

A. Well, you are compelled to by law.

Q. 53. I am talking about the actual facts.

A. I think they have got to be very careful. I would say generally six miles an hour is a locomotive trip time when it is carrying men.

Q. 54. Do you think that coal mining is a hazardous occupation or not a hazardous occupation?

A. I know that coal mining is a hazardous occupation, of course.

Q. 55. Is it more hazardous to be underground than it is to be out on the surface of the earth, when you have what you call outside men and inside men?

[fol. 206] A. The hazard is on the underground workers, and that varies from man to man, but on the whole, first, there is a difference between the hazard in one mine underground as compared with the hazard in another mine. That depends on many things, the texture of the roof, and all that. Some times there is a greater difference in the hazard between A Mine and B Mine underground than there is difference in the hazard of being employed outside and inside at the same mine. Now, over all, there is a greater hazard in working underground than outside.

Q. 56. You speak of difference between mines, and in this economic history of the coal mining industry of America, the Operators and Mine Workers have been confronted with many variable factors that they had to work out, haven't they. For instance, not only do hazards vary in mines, but the depth of the seam varies from mine to mine, does it not?

A. Do you mean the height or thickness, yes.

Q. 57. The thickness of the coal?

A. That's right.

Q. 58. The quality of the coal varies?

A. That doesn't contribute to the hazards necessarily.

Q. 59. I am leaving the hazards out and looking at it from the economic standpoint. The thickness of the seam varies and the quality of the coal varies from region to region, does it not?

A. And from seam to seam.

Q. 60. And you have impurities and you have different rock formations, so that in some mines a man may have to move half a ton of rock to get out a ton of coal and in other mines he wouldn't have to move a hundred pounds of rock?

A. That is correct and is usually reflected in differences in rates in the wage scale for the difference in the task.

[fol. 207] Q. 61. And you have the economic factor of the geographical location of the mines, some accessible to markets and others remote from markets?

A. Well, that is difficult to reply to categorically, Colonel. In the first place, your wage scale has been predicated upon producing under the same natural conditions as nearly as

possible a uniformity of cost of production. On top of that, you have this situation of large groups of coal mines, regardless of distance, within that area or grouping, having the same freight rates to the same markets, the same rate will apply over a quite broad blanket of consuming destinations. In other words, this whole scheme of marketing and distributing coal is predicated less upon location than any other largely, widely distributed commodity. In other words, there has been an attempt, so far as I understand it, to localize production and distribution of coal and that does depend upon distance. As you get away into the outer reaches you have very small, relatively small freight rate differentials for a broad coverage of distances between mines. The same theory that blankets the destination for the consumption of coal and the same theory that blankets large groups of mines for the minimum freight rate to these consuming destinations is the same theory that has caused the mining industry to predicate its wage structure on equal hours of work at your daily task.

Q. 62. Unquestionably it is true, is it not, that the coal mining industry has worked out, through the operators and the Mine Workers, many complex problems in the past thirty or forty years?

A. That is undoubtedly true.

Q. 63. Now, then, your objection to,—as I understand your language your objection to any shift to a portal to portal basis is because it complicates the wage structure?

[fol. 208] A. Well, I think it complicates the wage structure, under the competitive conditions in the industry, unnecessarily, and not constructively but destructively, and that it isn't work time, as I have always known work time in that substantial number of years that I have been there.

Q. 64. You do know that travel time is considered work time in the coal mines of practically every civilized country on earth, except up to the last few months or few years, but the United States, don't you?

A. Well, I will not attempt to qualify as an expert on travel time in other countries, or bank to bank pa. ment, which varies from district to district, from country to country, and it is my knowledge, or my understanding that in England your bank to bank time is predicated upon a composite man who receives a stipulated sum having no relation whatever to the length of time he travels, except as the average or composite man travels, and does yield in most

districts six and a half hours at the face for the hewers and seven hours for the day and hourly men.

Q. 65. The phrase "bank to bank" came from England, didn't it?

A. That's right.

Q. 66. And bank to bank in England is the substantial equivalent of portal to portal in America, isn't it? The two phrases are synonymous?

A. I would say substantially so, but the method of application has no relation to the expression of "bank to bank" compared to "portal to portal" or "collar to collar".

Q. 67. You are familiar with the International Union of the United Mine Workers of America, are you not?

A. Yes.

Q. 68. And with the constitution of that organization?

A. Well, it's been a long time since I used that.

Q. 69. They had a Constitution when you were with them, didn't they?

[fol. 209] A. Oh, yes, they did. I was familiar with it at that time, but it has been changed greatly, I understand.

Q. 70. I don't expect you to remember the details. I show you the Constitution of the International Union of the United Mine Workers of America, adopted at Cincinnati, Ohio, November 1, 1942, and call your attention to Article 2, stating the Objects of the Union, and to the third paragraph of that Article, which reads: "To demand that not more than six hours from bank to bank in each twenty-four hours and not more than five days per week shall be worked by members of our organization." Doesn't that refresh your recollection, and isn't it a fact that over a period of many years that provision has been in the Constitution of the International Union of the United Mine Workers of America?

A. I do not know where it went in. Frankly, I don't recall it. It may have been or may not have been. It's been a long time since I read this Constitution. No one will deny that the United Mine Workers of America has always included in its objects all there was and a good bit more.

Q. 71. Including portal to portal. Now, Mr. O'Neill, as I understood it, you stated that at every Conference from 1933 or 1934 on, they had advanced the six hour day claim?

A. That's my recollection.

Q. 72. And back in 1919, and again in 1943, in the Wage Conference, they brought up specifically the portal to portal claim?

A. That's my recollection.

Q. 73. Now, then, since those Conferences began in March, 1943, up until the present time, the United Mine Workers of America, since making that demand, have continued to make that demand of portal to portal, haven't they?

[fol. 210] A. Colonel, I think—Colonel, this is what I have to say about that: The Mine Workers, in their formal demands had twelve different paragraphs, as I recall it. Some of those paragraphs included a number of items. I think we made a separation of the different items included in your twelve numbered paragraphs;—I am not sure of the twelve, but I think that's right,—and it equalled something over twenty proposals for changes in wages or working conditions or hours of employment. So far as I know, I don't think the United Mine Workers have dropped any of them even yet. They never do. I mean, as I said, they assert and we deny until we clarify the issues and if there is one real issue at the end, that's what we try to settle. If there are two, we settle them, and an agreement is made on that basis for a period of time. Then the United Mine Workers bring all the demands back in at the next conference. They never drop them.

Q. 74. In the negotiations since March, 1943, up to date, the Mine Workers have not abandoned their claim for portal to portal, have they?

A. No, they have not.

Q. 75. As a matter of fact, their insistence upon portal to portal has been the reason why you haven't come to a contract, isn't it?

A. The insistence on portal to portal, I think, comes from the fact that the Operators would not grant a wage increase and that from the support of the decision of the Circuit Court of Appeals, the United Mine Workers' weight shifted from the wage increase as such to a demand for portal to portal as such.

Q. 76. And that demand has been the reason that you haven't had a contract?

A. Well, I will say it is one of them.

Q. 77. And the cessation of work in the various fields has been accompanied by the shorthand statement, "No contract, no work," on the part of the miners, hasn't it?

[fol. 211] A. Well, "No contract, no work," is a slogan which, like any other practices that you use in the conduct of your business, is brought out at a propitious moment when you want to use it. When you don't want to use it you lock it up in the closet. "We will continue negotiations, pending a contract," is a slogan, too. "No contract, no work" is brought out and used when economic conditions justify its use.

Q. 78. As I understand, you told the gentlemen on the other side in response to a question, that the Operators and the Mine Workers are actually meeting today, trying to work out a contract?

A. Yes, and I am supposed to be there and you have got me here.

Q. 79. No, I didn't get you here, although I am glad to have you. You haven't been able to come to an agreement and arrive at a contract since these negotiations began in March, 1943, have you?

A. That is correct.

Q. 80. That applies generally throughout the industry?

A. You mean Miner-Operator contract.

Q. 81. Now, then, when this letter Mr. Houck joined in signing was written, didn't Mr. Houck take the position that the United Mine Workers of America and your Association had a contract and the Mine Workers wanted to live up to their contract?

A. That was their position throughout,—Mr. Lewis's position, Mr. Murray's position, Mr. Bittner's position,—who was then with the United Mine Workers.

Q. 82. I will ask you if it is not a fact, both in your dealings as a member of the United Mine Workers and as a coal operator, if that hasn't been the uniform policy of the United Mine Workers to live up to their contracts?

A. That's been my experience.

[fol. 212] Q. 83. And you know, do you not, that in this case the attorneys have filed an amendment disclaiming any pay for travel time during the period covered by the contract?

A. I have heard that. I don't know it, as a matter of fact, but I have heard that statement.

Q. 84. Now, on this question of travel time, you coal operators had many problems confronting you and as long as you didn't have to pay for travel time, you didn't devote

your engineering tactics to cutting down travel time, did you?

A. Well, I don't think travel time as such ever entered into engineering problems in the bituminous coal mining industry. However, do not forget that the engineering problem that confronts the industry at all times is to provide transportation of its production at the lowest cost, and that is whether it is better for you to continue—I am thinking now of a prosperous coal company that might have enough money to do this thing,—they all know what they ought to do, but some of them can't do it on account of financial troubles, but where a company is financed, it always is a problem of whether it is more economical to transport its coal so many miles under-ground or either sink a new drift or shaft, and where they figure they can reduce their cost of transporting the coal to the tipple by a new shaft or a new slope or new drift, that's what they do. That automatically shortens the travel time of the mine.

Q. 85. And if they now have to pay for travel time which they did not have to pay for before, they can economize by opening new portals or new slopes or new drifts, or whatever you call it?

A. Well, I wouldn't know how to say that except to say this,—that to the extent that travel time adds to the cost of production of coal, it makes the engineering answer obvious that much more quickly.

[fol. 213] Q. 86. For instance, in your own operation, have you explored in the last few months the possibility of shortening travel time?

A. Well, we are exploring it.

Q. 87. Haven't you found that you can cut down on travel time?

A. We are not sure of that, Colonel. As I say, that's an engineering problem of some consequence. To shorten the travel time to any extent at the two large mines we are trying to consider, it means the sinking of a shaft five hundred feet deep, and that's a lot of money. In other words, it goes back to the economical proposition, and the higher cost of transporting coal, and if you are going to transport men and pay for it, your decision has got to be made on that basis, as to whether or not you will make your great expenditure of money.

Q. 88. Now, Mr. O'Neill, it has been mentioned here yesterday and today about this new problem where a tonnage

man gets travel time. Isn't it a fact that up to the present, up to the time you left Washington, instructions showing how to compute the travel time pay of a tonnage man had not been issued?

A. That is true, Colonel. Of course, you know that the Mine Workers on one hand and the operators on the other have been consulting with the Department of the Interior almost daily, trying to get a formula worked out that would be satisfactory. You also know that the formula agreed to in the Ickes-Lewis Agreement has been submitted to the War Labor Board since last Friday. It hasn't yet been approved but has been looked over by everybody in the industry.

Q. 89. Do you understand, Mr. O'Neill, that that formula would pay a tonnage man who went in and produced one ton of coal as much money for his travel time as it would another tonnage man who went in the same distance, under the same conditions, and produced ten tons of coal on a shift?

[fol. 214] A. It would for the travel time.

Q. 90. Isn't it an incentive plan on travel time? Have you personally checked it?

A. My understanding is that the wage structure is based upon productive time. The travel time is paid for on an assumed forty-five minutes of travel time a day and it provides in excess of forty hours he receives half rate after forty hours.

Q. 91. Don't you understand on the tonnage man, to get his hourly rate, the formula takes into consideration how many tons he produces and what he actually earns while producing, and uses that as a basis to figure his travel time pay?

A. This is correct. As I understand, you add one-eighth of his daily production and at the average rate established on his straight time earnings, or for his mining eight tons a day on this contract, he gets rate and a half on his last ton. However, if the result of this is that the man who has been producing seven tons a day in seven hours at the face is cut back to six hours at the face by reason of excess travel time, his earnings are not going to be as great as the man who has his face time lengthened.

Q. 92. Of course, in any great industry, whenever there is any change or shift, there is always give and take, some profit and some lose, do they not?

A. On an average basis, that is true. In this instance, you have transferred the differentials to the miners themselves at a greater cost of production to the industry and to the country. My criticism of this is that it is not a constructive move.

Q. 93. You have no doubt but that the miners have capable consultants and they have a difference of opinion with you?

[fol. 215] A. I would say, Colonel, that they have very, very capable consultants, and I don't have to look beyond you to know that they do have very capable consultants.

By the Court:

Q. 94. I am not sure that I undetrstand the incentive plan. I understood you to say in the agreement reached between the Secretary of the Interior and the President of the Mine Workers, that forty-five minutes was assumed to be the average travel time?

A. That's right.

Q. 95. But you confused me a little by this incentive plan. Did I get you correctly, the coal loader isn't going to receive pay for that forty-five minutes but some fraction of that, depending on the amount of coal he gets out; is that right?

A. There is an assumed travel time of forty-five minutes, which accumulates to make up the forty hours and its excess. If a mine has fifteen minutes of travel time,—that's an unusual case, it leaves eight hours and half of work time at the face for the men in that mine or that place. If a mine has an hour and forty-five minutes of travel time, which isn't unusual, it leaves but seven hours of work time at the face for the men in that mine, so that the men in the short travel time mine have an opportunity to earn for eight and one-half hours of productive time, and the men in the long travel time only have seven hours to engage in productive time, the effect of it being that the earnings of the eight hour and a half man will be increased if he works the eight hours and a half, whereas the man who works only the seven hours will earn just his present rate

plus *pme*-half time on one-eighth, and there isn't any incentive in that.

[fol. 216] Redirect examination.

By Mr. Richardson:

Q. 1. You have been asked, Mr. O'Neill, about the effort through the years on the part of the Union to get shorter hours. That has been, has it not, shorter hours per man per day?

A. That's right.

Q. 2. As contrasted with shorter hours per ton of coal?

A. That's right. Shorter hours per day.

Q. 3. The emphasis that has been placed in the Conference negotiations by the Union has been for the direct benefit of the employe and not for the larger benefit of the public in getting more coal per man hour?

A. Well, of course, there is lots of argument about that. A reduction in the day's work will, of course, reduce production per day per man unless your hours are so long that it is maintained in that manner.

Q. 4. There is imposed in that problem the matter of mechanization, is there not?

A. Well, I think it applies equally to the men, but by the application of power or machinery, you increase your production per day per man.

Q. 5. The object of mechanization is to shorten the man hours per ton?

A. That's right.

Q. 6. And there has not been the same insistence by the Union for that shortening that there has been in the man hours per day?

A. Well, the Union has not opposed the introduction of machinery, and in many instances, the official organization supported it. The Union has always contended that they were entitled to a share of the greater rate of production to [fol. 217] be reflected in the wage schedules.

Q. 7. But the emphasis, as you explained to Col. Harris, was upon the shortening of hours for the immediate benefit of the men themselves?

A. That's right.

Q. 8. You referred to the long-continued negotiations in 1936 for a Wage Agreement. You participated in those negotiations?

A. Yes.

Q. 9. Do you remember that in the course of those negotiations, there were successive agreements to extend the life of the April 1, 1934, wage contract?

A. That is correct. We had three or four extensions on the basis of continuing work pending negotiations.

Q. 10. Is it not a fact that the 1934 wage Contract, although made effective from April 1, 1934, until April 1, 1935, was actually, by agreement, extended to continue longer?

By Mr. Rogers: We want to object and move to strike the answers about the mechanics of the extensions of contracts back in 1934 and 1935 as having no bearing on the instant case, and therefore, being immaterial.

By the Court: Overruled.

A. That is right. I think there were three or four extensions.

Q. 11. And those extensions were accomplished by the agreements reached in the wage conference of which you were a party?

A. That's right.

Q. 12. You have said that you were a party to the Wage Negotiations in 1943?

A. That's right.

Q. 13. Is it not a fact that in the course of those negotiations, there was an agreement reached between the repre- [fol. 218] sentatives of the Union and representatives of the Operators for an extension through the month of April, 1943, of the agreement that had been made in 1941 for the effective date April 1, 1941, through March, 1943?

A. That is correct, but I think the difference between that and 1935 is this, Mr. Richardson, that on March 22, 1943, we received a telegram from the President, in which he asked work to be continued on that basis, but it was subject to a retroactive payment of any changes of wages that might be made in the meantime, and that policy has been consistently followed since that time by the War Labor Board.

Q. 14. My whole point was to get the simple fact out that there was in April an agreed extension of the 1941 contract?

A. That's right, there was.

Q. 15. And after that, there was an order of the War Labor Board, directing a further extension of that contract, subject to certain amendments which it required?

A. That's correct.

Q. 16. You were asked some questions as to the hazards in the mines.

By Mr. Richardson: If Your Honor please, before presenting this question, we feel the matter of hazards is not germane to the issue before the Court in this case, and we are presenting this question merely to enlarge this testimony on a subject matter which we feel basically is immaterial and against the idea that by asking these questions, we admit ourselves to an acceptance of that as material. I should like to say that we do not.

By the Court: You may examine him on that basis.

Q. 17. You have given some statements as to the hazards in mines, summarized, I believe, by saying, overall, the inside hazards are greater than those outside. Within the mine operations inside, what would you say as to the hazards in man-trips and in travel from portal to the place of work?

[fol. 219] A. I would say that outside of very exceptional circumstances, there is no danger whatsoever in travel in man-trips in the average coal mine. I mean an accident to a man-trip is a rarity.

Q. 18. You have been asked whether the mine owners and the Mine Workers together have worked out many complex questions and I believe you have agreed that that has been done. May I ask you if it hasn't also been your experience that there has been forced upon the mine operators on occasions by the Mine Workers, the acceptance of things to which they did not agree?

A. Well, what period of time are you covering, Mr. Richardson, in that statement. There have been strikes in the industry, there have been delayed negotiations, there have been all those things.

Q. 19. Let's cover the period from 1933 to date.

A. Well, in 1933, we made an agreement. In 1934, we made an agreement. In 1935, after delayed negotiations, from time to time, we made an agreement. In 1937, we—I don't remember the delay, we made an agreement. In 1939, we made an agreement. In 1941, the Northern

operators concluded an agreement, I think, by May or June 10th following April 1st. The Southern operators had much greater difficulty and I forget when they were successful in making their agreement, but they had quite a lot of trouble. In 1943, of course we have not concluded an agreement up to date. In other words, we have been from St. Patrick's Day to Thanksgiving Day, and haven't got an agreement.

Q. 20. The United Mine Workers include among its membership all of the Mine Workers or substantially all of the Mine Workers in the bituminous coal mining industry in the United States?

A. They include everybody except a class of exempted employes, supervisory in character, that is set out.

[fol. 220] Q. 21. With that coverage, is the United Mine Workers in a position, through its power to strike, to force upon the industry such changes as it may determine should be made?

A. I would say the United Mine Workers is a very powerful organization and can use a great deal of force and compulsion with the use of the strike weapon. In fact, I think they are the strongest organization, in that sense, in the United States.

Q. 22. You have been asked if an agreement could be reached by acceding to the portal to portal demand. May I ask,—perhaps this will elicit an explanation of conclusion or opinion,—whether an agreement could have been reached by acceding to the wage increase demand of $2.00 a day without the portal to portal proposition?

By the Court: That question answers itself.

Recross-examination.

By Col. Harris:

Q. 1. Mr. O'Neill, with reference to this retroactive extension you mentioned, of April, 1943, that was in writing, was it not?

A. Oh, yes. At least, Colonel, I will say the first one was; whether the second one was, I do not recall.

By Col. Harris: We feel the writing would be the best evidence.

By Mr. Richardson: Senator Burke has a copy of that and in due time will introduce it.

By Col. Harris: And the same way as to the directive of the War Labor Board and his statement about the directive. We, of course will move to strike out at the proper time.

By the Court: I do not deem it necessary to strike out but do direct that where these matters are embodied in written instruments, they be produced, where available.

Witness stands aside.

[fol. 221] At this point, it being 1:00 O'clock P. M., a recess was taken until 2:00 o'clock P. M., at which time the trial of this case was resumed.

By Mr. Richardson: If Your Honor please, we should like to tender and ask leave to file, as Exhibit 22, a document, being a copy of an address scheduled for delivery by Colonel Philip B. Fleming, Administrator, on September 15, 1940, which has been duly examined by counsel.

To which the same objection was interposed by counsel for the defendants.

By the Court: All right. Over the same objection, the document is admitted.

The document referred to was thereupon filed, marked as:

"Plaintiff's Exhibit No. 22",

and is returned as a part of this transcript.

By Mr. Richardson: Likewise, as Exhibit No. 23, what appears to be a copy of an article written by Col. Philip B. Fleming, Administrator, Wage and Hour Division, for publication in the Engineering and Mining Journal of April, 1941.

To which the same objection was interposed by counsel for the defendants.

By the Court: Over the same objection, the document is admitted under the same circumstances as the previous documents.

The document referred to was thereupon filed, marked as:

"Plaintiff's Exhibit No. 23",

and is returned as a part of this transcript.

By Mr. Richardson: And also as Exhibit No. 24, Interpretative Bulletin No. 13 on Hours Worked, being an

official interpretative bulletin of the Wage and Hour Division, issued in July 1939.

[fol. 222] To which the same objection was interposed by counsel for the defendants.

By the Court: Over the same objection, the document is admitted under the same circumstances as the previous documents.

The document referred to was thereupon filed, marked as:

"Plaintiff's Exhibit No. 24",

and is returned as a part of this transcript.

By Mr. Richardson: There was some objection before noon to the testimony of Mr. O'Neill, touching, I believe, particularly the Directive Order of the National War Labor Board, and suggestion was made that the official documents be obtained. We think, to complete this record, and to bring to this Court's attention, whether it may be entirely germane or not, we should have all these proceedings before the War Labor Board in respect to the Bituminous Coal Contract and the several opinions. That would require a good many documents, and we wonder if we could obtain unofficial copies of all these documents and in the process of this proceeding, submit them and have their authenticity attested and submit them without procuring certified copies from the Secretary of the Board.

By Col. Harris: That will be all right. We wouldn't put them to the trouble of getting those copies. Of course, as to the admissibility, we reserve the right to object.

By the Court: It is understood, so far as their authenticity is concerned, such documents may be admitted by agreement, but as to their general pertinency, materiality and admissibility, the defendants reserve the right to object.

By Mr. Richardson: Thank you, sir. That would include such documents as, for instance, the Illinois Wage Contract and the amended contract and the communications between the Secretary of the Interior and the War Labor Board.

By the Court: All right.

By Mr. Richardson: We would like to include in that a statement from Mr. K. C. Adams, contained in a communication addressed to Mr. J. D. Battle, Secretary of the National Coal Association.

[fol. 223] By Col. Harris: Of course, I am not familiar with that.

By the Court: Nor am I, and I can't rule on it until it gets here. I think the matter of authenticity might well be stipulated.

By Mr. Richardson: That's the only point I speak to at this time.

By the Court: Very well.

J. D. A. Morrow, another witness introduced on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct-examination.

By Mr. Richardson:

Q. 1. I believe your name is J. D. A. Morrow?

A. That's right.

Q. 2. Where do you live, Mr. Morrow?

A. I live in Sewickley, Pennsylvania.

Q. 3. In what business are you now engaged?

A. I am President of the Joy Manufacturing Company, which manufactures various types of mining machinery.

Q. 4. Have you been in the bituminous coal mining business?

A. Yes, sir.

Q. 5. For how long?

A. My first connection with it was in 1916, when the operators of the Western Pennsylvania District met to organize an association there and engaged me to act as secretary and their labor commissioner, which I did. I remained with them for a little over a year and was then asked by the operators to come to Washington and organize the National Coal Association, representing all of the operators of the United States, in the fall of 1917, which I [fol. 224] did, and I was with them until the fall of 1923. During the war, I acted as general director in the distribution of coal and coke for the United States Fuel Administration, from the 28th of January, 1918, to June, 1919. In the fall of 1923, I left the Association to go into the wholesale coal business. I continued that for about two years and during that time, I acquired an interest in the Joy Manufacturing Company, which was then just being started. In 1925, I closed out my coal business to become the sales manager, vice-president and sales manager, of that com-

pany. In April of 1926, I called on the Chairman of the Board of the Pittsburgh Coal Company in an effort to sell him some of these mining machines. I did not succeed in selling him the machines, but before I got out of his office, he sold me the job of sales vice-president of the Pittsburgh Coal Company. I became president of that company January 1, 1927, and served as president of the company until September 1, 1940, at which time I resigned to become president of the Joy Manufacturing Company. I might say I had retained my stock interest in that company and for a number of years served on its board of directors prior to becoming its president. I have been the president of that company since,—still am.

Q. 6. Then you are not at this time in the coal mining business?

A. No, sir.

Q. 7. Through this experience with the business, however, you became familiar with its general practices, did you?

A. Yes, sir.

Q. 8. Did you take any part in the negotiating of wage contracts?

A. Yes.

Q. 9. Beginning when?

A. In the spring of 1917, the four state competitive field conference was called together to consider a revision of [fol. 225] the contract that had been made the previous year. It is my recollection that meeting was held in New York. I was not on the Scale Committee of the Western Pennsylvania Operators' delegation, as I recall it, but I did have charge of the preparation of their statistical material and participated in their discussions and those of the other Wage Scale Committees of Ohio, Indiana and Illinois throughout that Conference, and attended the general sessions of the Conference. I was not in any other wage conference from that time until 1933.

Q. 10. Did you participate in the hearings on the General Code under the NRA?

A. No, I did not. I was on one of the committees that assisted in drafting the Code. I think Mr. Jamison represented Western Pennsylvania as a witness in those hearings.

Q. 11. You did participate in the negotiating and making of the wage agreement that incorporated the General Coal Code provisions, didn't you?

A. That's true, in the fall of 1933.

Q. 12. You are familiar with the general provisions of that NRA Code, prohibiting the employment of men more than eight hours a day or forty hours a week in the mines?

A. Yes, I recall that.

By Col. Harris:—Am I correct in assuming that the same objection that I put in to Mr. O'Neill's testimony goes as to this?

By the Court: Let it be so understood, and the objections will be overruled to the whole line of questions.

Q. 13. Was it generally understood and followed in practice in the industry that the eight hour day meant eight hours at the working place?

A. I would say it was generally so understood.

Q. 14. And was it generally so practiced?

[fol. 226] A. So far as I know, it was.

Q. 15. Was there any contention in the Wage Conference out of which the 1933 contract came for including travel time within that eight-hour day?

A. No, I recall none.

Q. 16. Did you participate in the Wage Conference in the spring of 1934?

A. Yes.

Q. 17. There, I believe, as Mr. O'Neill has explained, the working day was shortened from eight hours to seven hours?

A. That's correct.

Q. 18. I wish you would state, Mr. Morrow, whether in negotiating that contract, there was any contention by the Union for a departure from the face to face basis of computing the work day?

A. No, I don't recall that there was. The travel time was mentioned, there was some discussion of it, as I remember it, in that Conference, but it is my recollection that the *amin* argument of the United Mine Workers followed the general policy that then was popular of reducing working time in order to spread available employment, and in connection with that discussion, they emphasized the fact that many of the miners had to leave home and travel some distance to reach the mines and had some further

travel time to get to their working places in the mines, repeating that process in the reverse direction when they went home, and that it left them correspondingly less time for recreation and other pursuits than was true of employes in other industries. That was one of the arguments that was advanced in justification of shortening the working time at the face as well as for spreading the work among a larger number of men, which they thought that would do.

Q. 19. Was there any argument asserted that the pro- [fol. 227] hibition against working time in excess of eight hours a day prevented the working day of eight hours exclusive of travel time?

A. I am not sure that I understand just what you mean by the question, Mr. Richardson?

Q. 20. You have said that it was generally understood, so far as you know, that the eight hour day provided in the NRA Code as a maximum work day excluded the travel time?

A. That's right.

Q. 21. And was eight hours at the face?

A. That's right.

Q. 22. Was there any contention at the 1934 Conference to the contrary?

A. No.

Q. 23. And the argument that was made was as you have said, for a reduced day but still a day measured by the hours spent at the face?

A. That's correct.

Q. 24. Did you participate in any way in the hearings on the Fair Labor Standards Act or the Wage and Hour Act?

A. No.

Q. 25. You were then in the bituminous coal mining industry?

A. Yes, sir.

Q. 26. At the time it was enacted in the summer of 1938, was it universally practices throughout the bituminous coal mining industry in the United States to determine the working day on the face to face basis?

A. So far as I know, it was.

Q. 27. And you were pretty generally acquainted with the mining practices?

A. Yes, fairly well.

[fol. 228] Q. 28. After that enactment, when did you first hear of any question arising as to the application of the Wage and Hour Act to travel time in the mines?

A. It is my recollection that the first intimation that I had that there was any question of that kind was when the investigation was made in Central Pennsylvania that Mr. O'Neill mentioned this morning.

Q. 29. Let me ask you there, did you participate in the 1939 Wage Conference?

A. Yes, I did. I was a member of the Negotiating Committee.

Q. 30. In that capacity, were you a member of the Scale Committee?

A. Yes, of the Sub-committee that negotiated the Agreement. As I recall, there were four of us.

Q. 31. When did you cease to be a member of that?

A. When I resigned the Presidency of Pittsburgh Coal Company, on September 1, 1940.

Q. 32. Dealing with the 1939 Wage Conference, where you served as a member of the Sub-committee, was there any contention made on behalf of the Mine Workers that the requirements of the Wage and Hour act would compel including travel time in the work week?

A. I don't recall that there was.

Q. 33. Was there any demand at that time for a change of the basis of computing the work week from face to face?

A. No, I don't remember any at that time.

Q. 34. You say the first time you ever heard this question raised was in connection with the investigation of the Revloc Shaft?

A. That's true. It is my recollection that at some stage of the investigation, and perhaps rather early in its course, Mr. O'Neill called me up to know if any similar investigations were being made in Western Pennsylvania. At [fol. 229] that time there was none and I so informed him, but told him I would be glad if he would let me know what went on in Central Pennsylvania.

Q. 35. When it came to your attention that there was the suggestion or the claim that travel time was to be counted in work time under the Wage and Hour Law, was that a surprise to you?

A. Yes, it was, and my first reaction to it was that when the officials of the Wage and Hour Administration became familiar with the contract and the long established custom

and practice in the bituminous coal mining industry, the investigation probably would go no further in Central Pennsylvania.

Q. 36. Having in mind that that information was a surprise to you, can you say positively that there was not in the 1939 Wage Conference any argument advanced on that basis?

A. I don't recall any at all.

Q. 37. You participated in the Conference?

A. Yes, and if there had been any argument of any moment, I would have remembered it.

Q. 38. You did, in 1939, make a contract, wage contract, on the face to face working day basis?

A. That's true.

Q. 39. And that contract was in effect at the time that this investigation was made at the Monroe Mining Company's mine?

A. That is true.

Q. 40. Mr. O'Neill has stated that occurred some time in February, he thinks, of 1940. Thereafter, was there some investigation made into the practices of the Pittsburgh Coal Company, of which you were President, in respect to compliance with the Wage and Hour Law?

A. Yes, there was.

[fol. 230] Q. 41. About when was that?

A. I would say it was late in May or early in June. It extended over some little period of time.

Q. 42. That's 1940?

A. That's 1940, and it is my recollection there were some inquiries and some investigations made at some mines of other companies there in Western Pennsylvania.

Q. 43. Did you get in touch with Mr. O'Neill then?

A. Yes, I did. The operating officials of the Pittsburgh Coal Company informed me of those investigations and also of the fact that there were rumors beginning to circulate among our employes at the mines to the effect that the company owed them large amounts of money legally.

Q. 44. Mr. Morrow, approximately what was the production of the Pittsburgh Coal Company then?

A. In round figures, it was about one million tons of coal a month.

Q. 45. And approximately how many employes?

A. Between eleven and twelve thousand.

Q. 46. You say the operating officials of the company informed you that there were rumors current among the employes that money was owing on that account?

A. That's true, and among employes of some other companies also.

Q. 47. Did you make any effort to measure that liability, if any such existed?

A. Oh, yes. I asked my Accounting Department to talk with the mine clerks where this investigation had been made and find out what basis, if possible, there might be for any statement of opinion to the effect that the company would owe its employes additional amounts under the Act, [fol. 231] and after a time the accounting department came back and said, of course, they didn't know exactly what the basis might be that would be employed, but if what was being talked about was the basis, the company at that time might have claims against it running up to several hundred thousand dollars, and they would be accumulating at a very substantial rate per day.

Q. 48. And that was in 1940?

A. That was in June of 1940.

Q. 49. And at that time the limit beyond which the penalty pay commenced was forty-four hours against a later forty hours?

A. Forty-two, as I recall it, as against a later forty.

Q. 50. That's right, forty-four the first year and forty-two the second year?

A. Yes, sir.

Q. 51. So this thing would snowball into still greater proportions?

A. It would.

Q. 52. What did you do about it, Mr. Morrow?

A. I asked my General Counsel for his opinion of the situation, and he said it, of course, was quite serious from a corporate standpoint, that we should report the matter to our Board of Directors, which had a meeting in a few days, as I recall it, and it would be necessary for us to undertake to get a determination of that liability, if any, at once. He did not believe the executive officers or the directors would care to continue operating a company subject to liabilities of such magnitude that they couldn't then be measured.

Q. 53. Then what did you do?

A. I called Mr. Lewis, President of the United Mine Workers.

Q. 54. Had you known Mr. Lewis for some time?

A. Oh, yes, I had met Mr. Lewis, I think, in 1919 is my [fol. 232] recollection,—and I told him what was happening out there, and these rumors still persisted among the employes, and I thought it was a pretty serious situation, but it would probably become even more serious and would presently lead to a good deal of unrest out there, probably interruption of production and strikes, and it was a matter that both the United Mine Workers and coal operators were immediately and vitally interested in and we should have a ruling from the Wage and Hour Administration as quickly as possible to find out whether we had a contract or not, or whether it had been overturned with respect to the working conditions and basis of pay by an administrative ruling in Washington. Mr. Lewis agreed that was desirable. I told him I intended to call Mr. O'Neill and some of the operators in the south with a view of seeing if we couldn't get a meeting of representative officials, or that, perhaps, it would be necessary to re-assemble the Appalachian Conference to deal with the situation as presented. Mr. Lewis said he would meet with us at our convenience. I did call Mr. O'Neill, and he agreed it was a matter that had to be dealt with as quickly as possible. I called Mr. J. D. Francis, of the Island Creek Coal Company, and Mr. Duncan Kennedy, of Charleston, and Mr. C. C. Dickenson, of Charleston, and possibly Mr. O. L. Alexander, of New York, president of the Pocahontas Fuel Company, and suggested the desirability of their participating in whatever meeting or conference we had in Washington with Mr. Lewis and the Wage and Hour Administration. At that time, they preferred not to participate in any such meeting on the ground that there were at that time no investigations going on in West Virginia and they felt it unlikely that any such ruling as was being talked about in Pennsylvania would issue in any event. I told them we were not so sure of that, and I thought Mr. O'Neill and I would go on down to Washington ourselves and see Mr. Lewis and Col. Fleming, the Administrator.

[fol. 233] Q. 55. Did you do that, Mr. Morrow?

A. Yes, we did. As Mr. O'Neill told you this morning, we did go to Washington, it was about the first of July,

as I recall, perhaps the 30th of June, and met in Mr. Lewis's office, and the gentlemen were present that he mentioned. We had a discussion with Mr. Lewis and Mr. Hopkins and Mr. Houck, of the United Mine Workers, and they all agreed that it was — condition that we should attempt to get a definite answer about as promptly as possible, and we all agreed to that. What we wished to have, if possible, was a ruling from the Administrator to the effect that the provisions of the contract should be accepted and that a bulletin that had been issued by the Wage and Hour Administration,—I have forgotten the title of that,——

Q. 56. Was that Interpretative Bulletin No. 13?

A. That's the one,—that the coal industry should be an exception to the general rule there laid down. Someone suggested that we should go back and see these attorneys that Mr. O'Neill and Mr. Cowan had previously seen. I told them I had not come to Washington to see anybody who could not give a final answer and the only person I cared to talk to there was Colonel Fleming, and what we needed was a decision as soon as possible.

Q. 57. Just one moment. In that conference you have just now described, was it the consensus that the 1939 Agreement, Wage Contract, then in effect was consistent with the provisions of the Wage and Hour Act.

A. Yes, we thought it was. We had the meeting with Colonel Fleming, as Mr. O'Neill has mentioned.

Q. 58. Incidentally, who made the appointment for that, if you recall?

A. It is my recollection that Mr. Lewis made the appointment. We asked him to go over with us and he said that he was sorry, he couldn't do that he had an appointment somewhere and had to take a train, as I recall, about [fol. 234] twelve or one o'clock, and he was obliged to leave, but he asked us to go over with Mr. Hopkins, General Counsel for the United Mine Workers, and Mr. Houck, which we did.

Q. 59. To get the record straight, who went to see Col. Fleming?

A. It is my recollection that Mr. O'Neill, Mr. Cowan, Mr. Hopkins, Mr. Houck, and myself, went there.

Q. 60. Tell us about your conference with Col. Fleming?

A. We explained to the Colonel what the practice had been in the industry, and that it was the result of long es-

tablished negotiations and experience with collective bargaining and the effort to establish basic wage principles—

The Court here asked for and examined Interpretative Bulletin No. 13, heretofore introduced in evidence.

A. We pointed out to Col. Fleming that if that provision there in that Bulletin 13 was applied in coal mines instead of the then standard seven hour basic working day at the face, for which the miners were paid the same amount in the same districts in the entire Appalachian area, we would have a multiplicity of varying wage payments per day, and those varying wage payments would be represented by the seven hour day plus the varying amounts that would have to be paid according to the length of travel time in each mine; and those would differ from mine to mine, and company to company, and district to district, and it would operate to destroy the very thing that the basic wage agreement was intended to provide, namely, a reasonably secure basis of operation competitively for operators in the same field, and if such basis was not approved, the result would be inequality of working time and consequently disturbed employment conditions in all these fields, and there would be disturbed working conditions between the mines of each company and the result couldn't help but be very disturbing, and it would undo the effort of the joint negotiations over [fol. 235] many years on the part of the coal operators and the United Mine Workers, to establish these firm bases for district wage agreements.

Q. 61. How about whether or not it would further the purposes of the Wage and Hour Act?

A. Instead of furthering the purposes of the Wage and Hour Act, we stated to the Colonel that in our view it would have diametrically the opposite effect. Colonel Fleming stated that it certainly was not the intent of the Act to have any such condition as that and he concluded the discussion by saying that as you men say, where a practice has grown up over a period of many, many years of joint negotiations between the employees and employers, that had been embodied in wage agreement after wage agreement, and was recognized as a stabilizing principle in these agreements, it ought not lightly to be overturned, and if would be his position to make the exception to Bulletin 13 that we had asked, but he said he had a very high regard for the advice

of the Counsel of the office at Philadelphia, Mr. Gallagher; whom he had known for a good many years, and in whose judgment he reposed a good deal of confidence, and he said he would want us to talk to Mr. Gallagher and would want to talk to him himself after that gentleman had discussed the matter with us before he would issue a ruling, but promised to do so promptly when we explained to him the seriousness of permitting an uncertain condition such as we then had and the circulation of rumors such as were then current in Western Pennsylvania to go any further. Subsequently, we had the meeting in Philadelphia that Mr. O'Neill recounted this morning, with the outcome that he told you.

Q. 62. Was it further represented to Col. Fleming there by this group that the arrangements reflected in the effective Wage Contract were reasonable standards as to hours of work and working conditions agreed upon between the employer and employe by collective bargaining?

[fol. 236] A. We told him that we considered that they were. At any rate, they were what had been agreed upon by the representatives of the operators and the miners in the district wage agreement, as a result of the joint conference for that express purpose.

Q. 63. And precisely what was contemplated in this Interpretative Bulletin No. 13 that had been previously issued?

A. Yes, sir.

Q. 64. Following that conference with Col. Fleming, did you meet with Mr. Gallagher and these other gentlemen, Mr. O'Neill has mentioned?

A. Yes.

Q. 65. Mr. O'Neill said that was on the 9th day of July, 1940.

A. I think that's right.

Q. 66. Do you recall who were present on that occasion?

A. I am not sure now that I could give the names of everybody that was present at that meeting. We called at Mr. Gallagher's office and I know Mr. Walter Robison, who had been chairman of the Joint Conference, was there, Mr. L. T. Putnam, of Beckley, West Virginia, and Mr. L. C. Gunter, of Knoxville, Tennessee, who were the Southern representatives on the Operators Negotiating Committee of four, were both present, and Mr. O'Neill was there and I think Mr. Cowan was present. I am not certain about

all the men who represented the Wage and Hour Division. Mr. Gallagher was present and I think Mr. Dorsey was present. It is my recollection that possibly there were one or two other men there, whose names I don't recall, may not have gotten them at the time I was introduced.

Q. 57. Was Mr. Houck there?

A. Mr. Houck was there, and Mr. Knight was there, the attorney for the coal company involved, and there may have been other persons, but I don't recall if they were.

[fol. 237] Q. 68. You have heard Mr. O'Neill describe the manner in which this letter was written. What have you to say as to the correctness of his statements?

A. Well, that is correct. After the discussion, in which we presented to Mr. Gallagher, over a little longer period of time—I mean he had more time to give us than Col. Fleming had, I think we went into more detail with him and his staff, Mr. Dorsey and the other gentlemen, than we did in Washington, Mr. Gallagher felt we should make a statement in writing of what we had told him which he could transmit to Col. Fleming with his opinion, and suggested that the United Mine Workers and the coal operators present each write him a letter. Someone present asked him if it might not be preferable from his standpoint if the operators and the United Mine Worker representatives drew that letter jointly, to make certain that he had a correct statement of fact before him. He said that would be better in his view, if we would write such a letter, and both sides indicated their willingness to do so. We then went to the office of the Weaver Coal Company, in Philadelphia, where we could get some stenographic assistance, and drew up the letter.

Q. 69. Was that letter a joint letter in the sense that all of the persons in this group contributed to its preparation?

A. Oh, yes; they were quite free with their comment and suggestion. It is the kind of letter written by several people when all work on it.

Q. 70. And the finished product represented the consensus of that group?

A. I would say it did.

Q. 71. Was there anything in that at all inconsistent with the agreement reached in Mr. Lewis' office a short time previously in Washington?

[fol. 238] A. No, it followed what had been discussed and agreed upon there as the interpretation that would be de-

sirable in the question of the employers and employes both in the bituminous coal industry. I might say before the letter was finished—we had suggested to Mr. Gallagher when we had a draft of it completed if he would take time to come over and read it through, we would be glad if he would do so, because through our familiarity with the situation, we might unintentionally omit some points he considered important, and we wished to give him a complete statement, with nothing omitted that he might wish to have, and he did come over after the letter was finished, and look it over, and it is my recollection he did suggest two or three additions which were commonplace to us but were perhaps of particular significance to him, and the letter was amended to include those additional details that Mr. Gallagher felt should be included in the statement.

Q. 72. Mr. Morrow, did that letter as written present accurately the facts and conditions in the industry as they have existed to your knowledge?

A. We thought it did. That's what we tried to make it do.

Q. 73. Do you still think so?

A. Yes, sir, I do.

Q. 74. There was a reply to the letter, as Mr. O'Neill has pointed out this morning?

A. That's correct.

Q. 75. After that reply, do you know what happened to the inquiries or investigations at your company's properties?

A. That ended them because there was no further need for anything of that kind.

Q. 76. Did your company accept this reply and the ruling announced shortly thereafter by Col. Fleming as an authoritative ruling upon this question?

[fol. 239] A. We did.

Q. 77. Did you seek any further ruling, any court action or any further determination.

A. No, we considered that conclusive.

Q. 78. You accepted that as a conclusive and final disposition of that matter?

A. Yes, sir.

Q. 79. What can you say as to whether that was generally accepted in like manner through the industry?

A. So far as I know, it was, without question.

Q. 80. The ruling was distributed by the National Coal Association throughout the industry, was it not?

A. That is correct, and also published in the coal trade papers that circulate among all the operators in the country.

Q. 81. And according to your knowledge, it was received and accepted as a ruling putting this question at rest?

A. Yes, sir.

Q. 82. I believe you say you went out of the coal mining business shortly thereafter, September 1, 1940?

A. Yes, sir.

Q. 83. You did so to some extent in the letter which you assisted in preparing, which you have described, but I wish you would tell the Court how, in your view, the shift from the face to face basis of determining the working day to the portal to portal basis would have affected the coal mining industry?

A. In 1939?

Q. 84. At the time you were dealing with it in 1940.

[fol. 240] A. Well, one of the first things it would have been necessary to do in the operation of the mines would have been to have a timekeeper alongside practically every man underground. You would have to know what length of time it took the man to get from the portal of the mine to the place he worked. You would have to know, you would have to have a record on which you could stand, otherwise you would be subject to claim that you hadn't paid this, that, or the other man the travel time to which he was entitled. That would be a very expensive administrative job. In the next place, as I indicated earlier, the earnings of your men, the scale that they would be paid, would constantly be different at different mines. The mines then that had the least travel time would have the lowest production cost because that travel time to the operating face that they would be paying for is nonproductive time. Illustrating it in this way—in one mine of the Pittsburgh Coal Company, in which their travel time was close to an hour and a half, forty-five minutes each way, take that out of the seven hours, which would leave five hours and a half of productive time. All overhead would be based on that five and one-half hours, or if you added it on, and you got seven hours at the working place, which you would probably do, you would have the additional hour and a half time to pay for. Contrasted with that is a younger mine in which the

opening is relatively short, twelve minutes in and twelve minutes out. The first mentioned mine would carry the cost of an additional hour's pay at time and a half, if it was beyond seven hours, over and above the cost that would be paid in the mine that only had twenty-five minutes. That mine paying that additional amount of wages in a competitive market would just not be able to compete with the other mine. Any company in that situation would transfer its business out of the high cost mine to the low cost mine. The men would have less and less work. They presently wouldn't have men to work, the men would go to other mines. Men who owned their own homes would be forced [fol. 241] to travel much longer distances to work, and that situation would be repeated over and over and over, throughout the coal fields, resulting in disturbed, unsatisfactory, objectionable employment. This would inevitably lead to a demand on the part of both the operators and the miners that something be done about it to cure that situation. That's what we presented to Col. Fleming. I think it is just as true today as it was then. It will operate in precisely the same way.

Q. 85. You do not think it would have served to clear the channels of interstate commerce of any obstructions of inequality?

A. No, it would have had the contrary effect.

Q. 86. And would it necessarily have resulted in higher cost production in the coal mining industry?

A. Yes, it would.

Q. 87. That is to say, unless there was a scaling down of the day rate, would it not?

A. It would.

Q. 88. How would the increase in the cost of production have resulted to the competitive situation as between coal and other competing fuels?

A. Every time you increase the cost of coal as against natural gas, fuel oil, hydro-electric power, you lose coal business, and it will inevitably have that effect, which will operate to reduce employment in coal mines, overall.

Q. 89. Were these same things you are talking about, were they true in 1938 when this Act was passed?

A. Yes, sir.

Q. 90. And you think they have been true continuously ever since?

A. Yes, sir.

[fol. 242] Q. 91. *Mor* Morrow, are you informed about the general condition of the bituminous coal mining industry throughout the country at 1938, as to whether it had been on a profitable basis in the preceding years?

A. No, it had not been on a profitable basis, speaking of the industry as a whole.

Q. 92. Industry-wide, it had been operated for some years on a loss basis, had it not?

A. That's correct.

Q. 93. And the competitive conditions in the industry were intense?

A. Yes, sir.

Q. 94. A very small margin in the price made the difference between sales and no sales?

A. Yes, sir.

Q. 95. And to that extent would have emphasized and intensified these dislocations which you have described?

A. That's correct.

Q. 96. Under the conditions that you have described as existing in 1938 and prior thereto for some years, do you think the bituminous coal mine having a long haul, and therefore a long travel time, could have survived in the competitive strife if forced to operate on a portal to portal basis?

A. Only in exceptional cases where there were some peculiar market conditions that would permit it to absorb the additional cost. As a general rule, no.

Q. 97. Mr. Morrow, you are now engaged in the mining machine business, I believe you said?

A. Yes, sir.

Q. 98. Is it or not a fact that the mines through the Illi- [fol. 243] nois area are mechanized to a greater degree than those throughout the Appalachian area?

A. Yes, that's true.

Q. 99. And the more highly mechanized the mine, the fewer man hours there are per ton of coal produced?

A. That's correct.

Q. 100. And therefore, the less significance in cost determination the wages paid the men?

A. Yes, a wage increase in a mechanized mine will increase the cost of production in that mine less than a similar increase will raise the cost of production in a mine not mechanized.

Q. 101. Do you happen to know whether it is a fact that in the Illinois area there are numerous strip mines in which there is no underground travel?

A. Yes, that is true; many of them in Indiana, also.

Cross-examination.

By Col. Harris:

Q. 1. Have you ever been a coal miner, Mr. Morrow?

A. No, sir.

Q. 2. Your experience has been on the side of the management or operators?

A. Except for the period of time when I was selling mining equipment.

Q. 3. You are doing that now, aren't you?

A. Yes. I am not actively selling the equipment in the mines. I am president of the company. I am not acting as salesman.

Q. 4. You are still connected indirectly with the coal mining industry in that you manufacture machinery that is [fol. 244] sold to coal mines?

A. It is one of my chief customers.

Q. 5. Do you own stock in a coal mine?

A. Yes, sir.

Q. 6. More than one?

A. No, sir.

Q. 7. Mr. Morrow, let me see if I get your picture. As I get it, your idea is, first, that in the coal mining industry in America, the pay has always been on a face to face basis?

A. Well, I wouldn't go so far as to say always.

Q. 8. During your experience and knowledge of it?

A. So far as I know, that's been true.

Q. 9. The travel time has never been paid for?

A. No, sir.

Q. 10. And to attempt to pay for travel time would bring about chaos and disrupt competitive conditions. That's your opinion?

A. I think it will have that tendency, yes, sir.

Q. 11. And that's due to the fact that in different mines travel time is of different lengths, and even in the same mine men travel different distances?

A. That's right.

Q. 12. Then you don't have the opinion that travel time is loaded in the wage scale, do you?

A. I didn't say that.

Q. 13. No. I am asking you that as an expert. Do you think travel time is loaded in the wage scale?

A. Yes, sir, it is my opinion that in all previous negotiations, the wage rates agreed upon included the travel time. That is, that was taken into consideration indirectly. Let [fol. 245] me make it a little clearer. I think, Col. Harris, the reason in it was this: If the basis of compensation was fixed as the time the man worked at his working place, you equalize the competitive conditions to that extent between mines, and to that extent you stabilize the earning opportunities of the men in the mines. In order to obtain that advantage, they accepted and absorbed the inequalities in travel time.

Q. 14. You are making a conclusion that is different from your statement of facts, as I understand it?

A. Oh, no, not at all.

Q. 15. What you say is by taking the time at the face and paying them for work at the face only, you were able to stabilize conditions and get a suitable wage scale. Am I correct?

A. I am saying that seems to have been the considered judgment of the operators and miners over a long period of years, because they made the wage agreements that way.

Q. 16. If all the miners were paid on the basis of the amount of time they spent at the face, where would the travel time that any miner had affect his wage?

A. It doesn't affect it as long as he is paid on the face to face basis.

Q. 17. Then so far as the miner is concerned, he has never been paid for travel time and the amount of his travel time has neither increased nor decreased his pay, has it?

A. Well, it may not have increased or decreased the pay of any individual miner, but I think it has operated, the rule that has been followed, to maintain a better quality of earning opportunity and employment opportunity.

[fol. 246] Q. 18. You say the situation you have adopted has been a beneficent economic solution, and I ask you, leaving out your general conclusion about its effect on the miner, about which people might differ, actually the miner has never got any pay, directly or indirectly, depending on the amount of travel time that he had?

A. I think that's true.

Q. 19. Now, this chaos that you talk about, you know, as a matter of fact, do you not, that the ore miners of the United States are paid on a portal to portal basis?

A. I understand they are.

Q. 20. And that they began paying them in Alabama two months before we tried the case down there, and throughout the United States they began paying them by contract along about January, 1942,—you know that the ore miners in Alabama for nearly two years have been paid on a portal to portal basis?

A. No, I am not familiar with conditions in the ore mines.

Q. 21. Is there very much difference between travel underground in an ore mine and travel underground in a coal mine?

A. I can't say that there is. There is, however, a great difference in the competitive situation in the ore industry and a great deal of difference in the value of the product and the market for it.

Q. 22. This question of portal to portal isn't the only great big problem that has confronted the ming operators, is it?

A. No, no, we have had others.

Q. 23. Let's take the question of differentials, for example, so the Court can get the historical background. What was the differential question that bothered the bituminous coal industry for so long?

A. In general, it was the difference in the day rates that were paid in the northern districts of the Appalachian field [fol. 247] as compared with those paid in the southern districts.

Q. 24. How long did that problem perplex the industry, how many years?

A. Well, we had it in 1933, when we made the first Appalachian basic Agreement, and we still had it in the last conference in which I participated, in 1939, six years later.

Q. 25. In other words, that problem was solved in 1941 largely through the efforts of Mr. O'Neill, wasn't it?

A. I don't know as to that. I wasn't present in 1941.

Q. 26. And there was considerable argument and difference of opinion as to the possibility of ever settling that differential between the northern and the southern mines, wasn't there?

A. Yes, sir, that's true.

Q. 27. And in the settlement of that great problem, the claim was made that if those differentials were ever abolished it would literally bankrupt the coal operators in the south, wasn't it?

A. I would rather you would ask the southern operators what they claimed in that respect. At that time, I was on the opposite side.

Q. 28. Weren't you familiar with what your opposition was saying?

A. I hardly think they went so far as to say they would all be bankrupt. They felt it would be a competitive hardship. Some of them would suffer severely.

Q. 29. And all your talk about portal to portal primarily comes back to a difference of opinion on competitive hardships?

A. I wouldn't say difference of opinion. It is a question of fact.

Q. 30. Then you had differentials in freight rates that perplexed the industry for a long time, and you worked [fol. 248] them out?

A. No, they have never worked them out; they still have them.

Q. 31. And that works a competitive hardship on some mines?

A. It not only works a hardship, it prevents the mine from being competitive and makes it extremely difficult for the mine to stay alive.

Q. 32. Isn't it entirely a Utopian dream to think that in an industry as widespread and complex as the bituminous coal mining industry, it can ever operate without having problems confronting both the industry and the workmen?

A. I think that's true, Colonel Harris, of any industry that is alive and progressive.

Q. 33. It is peculiarly true on account of the very nature of the industry, both as to the coal and the way it is produced?

A. It is peculiarly true because labor constitutes a much greater element in coal than other commodities.

Q. 34. Through the years the cost per ton of coal has decreased, hasn't it,—the tendency has been constantly for the cost per ton for labor to decrease?

A. No, I don't think so. I am not up on those figures. I think if you would say, Col. Harris, that the tendency is for the number of hours required to produce a ton of coal to decrease, I would agree with you there, but those man hours are being compensated for at a higher rate of pay, so where you come out net, I can't say.

Q. 35. The final solution of the wage equations, you can't answer?

A. No, I don't know just where that lands.

Q. 36. Now, isn't it a fact that when you turn from the production of coal to the selling of coal, we find that the United States Government and governmental agencies fix [fol. 249] prices at which the coal may be sold and take into account different factors?

A. They are fixing prices. I don't know what they take into account when they fix them.

Q. 37. But it is your understanding that the Governmental agencies try to adjust the prices to stabilize the industry?

A. No, I am not going to be that charitable to the United States Government in its price-fixing formula.

Q. 38. Would you be so charitable as to say that they try to fix the prices so that competitive conditions may be maintained on a certain permanent basis?

A. No, I don't know that.

Q. 39. Well, as a matter of intellectual curiosity, what do you think the Governmental price-fixing agencies are trying to do?

A. I don't know.

Q. 40. Now, then, on this business of the unsettled attitude of the miners when they were telling them up in your country that they had a claim for back time, I will ask you if every time you negotiate a contract, every two years, there are problems to work out in the adjustments under those contracts?

A. In the several districts?

Q. 41. Yes.

A. That's true.

Q. 42. And you find some inequalities in conditions that have to be ironed out and it takes a number of weeks to iron them out and get everything adjusted, doesn't it?

A. In some cases it does, Colonel Harris.

[fol. 250] Redirect examination.

By Mr. Richardson:

Q. 1. You were asked, Mr. Morrow, about the price fixing. Is there anything individual in the price fixing arrangements with which you are familiar?

A. No.

Q. 2. There has never been any attempt in Government price fixing to equalize the handicaps between individuals in any community?

A. I am not familiar with anywhere that is being done.

Q. 3. Going back to your understanding of the attitude on the part both of the mine operators and the Mine Workers, at the time when the letter of July 9th, 1940, was composed, would you not say that it was mutually recognized that travel was not work, and therefore that travel time was not work time?

The defendants, by counsel, objected to the question.

By the Court: I think that is leading and repetitious. The gentleman has thoroughly covered what took place. I will sustain the objection.

Q. 4. May I ask this: What was the recognized attitude as to whether or not travel in and out of the mine to the usual working place was work?

The defendants, by counsel, objected to the question, which objection the Court sustained.

Q. 5. One thing as to which I am not entirely certain: I understood you to say, Mr. Morrow, that you thought the inside mine worker had not, previous to this recent arrangement, obtained any pay based upon the amount of his travel time?

A. Not as such.

[fol. 251] Q. 6. But at the same time, you said that you understood his travel time, speaking generally, or the fact of travel time was included in the determination of the rates of pay arrived at and expressed in the agreements?

A. Yes, the bituminous coal industry has to bid for men against other industries, and it has to set a wage scale which, taking into consideration the conditions under which men are employed, is sufficiently attractive to keep men coming into that industry. In that sense, you do take into

account these conditions that you don't undertake to measure, one by one, so much for this, so much for that, but it is the considered judgment of the negotiating group, as Mr. O'Neill said this morning, that you have this issue or that one that at that particular conference are the important issues, and you address yourself to a solution of them, and it isn't a case of horse-trading it out but getting all the facts before the negotiators and reaching a conclusion based broadly and generally upon those facts, and they will take into consideration indirectly the overall conditions that are not specifically and individually measured in cents per ton or per hour.

Witness stands aside.

JOHN A. LUSE, another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Stuart:

Q. 1. You are Mr. Jack Luse?

A. Yes. My full name is John A. Luse.

Q. 2. Where do you live?

A. I live in Atlantic City, New Jersey.

[fol. 252] Q. 3. What is your business?

A. I am vice-president of the Capitol City Fuel Company, which is a selling agency of coal.

Q. 4. In what occupation were you engaged subsequent to the passage of the Bituminous Coal Act known generally as the Guffey Act?

A. Subsequent to its passage in April, 1937, I became an employee of the Bituminous Coal Producers Board for District No. 7, which is one of the District Boards which was set up under that Act.

Q. 5. Just proceed, Mr. Luse, and explain the connection that you had with the work of the Governmental agencies operating under that Act from the time you started your work until you finished.

A. I went there first in August, 1937, as a classification engineer. In December of that same year, I became secretary of that Board, and in December, 1940, became Executive Secretary of that District Board. I resigned my position from the District Board in June, 1942.

Q. 6. In what District, if you know, are the mines of this plaintiff, Jewell Ridge Coal Corporation?

A. These mines are in what was commonly known as District No. 7 under the Guffey-Vinson Act.

Q. 7. And that was the District with whose Board you were connected.

A. That is correct.

Q. 8. As a general proposition, I believe the Guffey Act authorized the charging of minimum prices for bituminous coal and set up machinery for arriving at the amount of those prices, did it not?

A. In general, that is a correct statement.

Q. 9. Were you present at the hearings which were had in which the testimony was taken, for the purpose of arriving at minimum coal prices under that Act.

[fol. 253] A. I was.

Q. 10. When did those hearings commence and when did they end, and what were the phases of them, in a general way?

A. The hearing was called General Docket No. 15. The first phase of that hearing, which was the cost phase, commenced in July, 1938, and the taking of testimony in that phase of the hearing ended in April, 1939. From time to time during those months, there would be adjournments of the hearing. In that first phase of General Docket No. 15, in the cost hearing, there were taken five thousand pages of testimony and about five hundred exhibits were put into the record on cost. The other phases, the minimum price phase and the coordinating price phase, continued on from the cost hearing and the taking of testimony was finally concluded in January, 1940. These other two phases consumed thirty-four thousand pages of testimony and about twenty-eight hundred exhibits were put into the record.

Q. 11. On the first phase, I believe you had the Commission which was set up under the Act, did you not?

A. Yes, sir, the Bituminous Coal Commission was abolished by Executive Order of the President in June, 1939, which set up the Bituminous Coal Division, Department of the Interior, to take the place of the Bituminous Coal Commission, and the Department of the Interior simply continued on with General Docket No. 15 hearings.

Q. 12. Who were represented at those hearings, Mr. Luse?

A. Well, there were hundreds of parties that entered appearances, and I would say one or two hundred that actively participated.

Q. 13. In particular, were the United Mine Workers of America parties, and did they appear?

A. Yes, sir, they entered an appearance. The appearance was entered by Mr. W. M. Policoff.

[fol. 254] Q. 14. Did the United Mine Workers have a member of the Commission?

A. I don't know whether the gentlemen belonged to the United Mine Workers of America or not at that time, but the two men who were miners were Major Tetlow and Mr. A. D. Lewis. As a matter of fact, before the Coal Commission was abolished, Mr. Tetlow became the Chairman.

Q. 15. After the Commission was abolished, did Major Tetlow stay on with the Commission?

A. He did. He remained as Technical Advisor to the Director, Howard A. Gray, and I know he remained until the final determination of General Docket No. 15 were put out. I believe he remained until prices became effective on October 1, 1940.

Q. 16. In a very general way, Mr. Luse, what was the purpose of those hearings and of the findings which were based upon them?

A. The purpose, in the Act of Congress it clearly states that it was to stabilize the coal industry, and the aim, or at least one of the aims in this effort was to return as nearly as may be the weight of average cost of production.

Q. 17. You went to that by getting the average cost first in the different districts and then by coordinating those for the whole industry, did you?

A. No, sir, that's not a correct statement. We first got the weighted average cost of the district, then this Act, the Bituminous Coal Act, divided the country into ten Minimum Price Areas. The Minimum Price Area in which the plaintiff was included was Minimum Price Area No. 1, which, incidentally, was the biggest Minimum Price Area in the country. For example, in 1937, Minimum Price Area No. 1 produced two hundred and ninety eight million tons of coal and the country produced around four hundred and thirty-two million tons of coal. The next biggest Minimum Price [fol. 255] Area was Minimum Price Area No. 2, which included Indiana and Illinois, and it produced about seventy-five million tons. Of course, the remaining Price Areas pro-

duced the rest, approximately seventy-five or sixty million tons. We would take the production cost of the District, weighted average production cost of the District, and get the weighted average cost for the price area.

Q. 18. By coordinating the costs in that area?

A. That is correct.

Q. 19. What was the starting point in getting the information as to cost? How did the Commission get the data upon which it started on its work? Was it in the form of some report?

A. Yes, sir. These reports were called "Cost Forms", and they numbered the Cost Forms and started off with No. 1. This Cost Form was something that wasn't exactly new. It had been worked on for years from time to time by different cost experts and members of the industry and men from the United Mine Workers and so forth, and they brought in all the talent that they could to perfect as nearly as possible a perfect cost form. These forms were sent out to the Code members.

Q. 20. Those were the individual producers, were they?

A. Yes, of which there were about thirteen thousand. That includes truck mines as well as rail connected mines. The costs were collected, commencing in the year 1936.

Q. 21. On those forms, each producer gave his cost under certain heads which were provided on the form, is that a fact?

A. That is correct, and he was also given specific instructions how to fill out the forms.

Q. 22. Mr. Luse, in the entire course of those proceedings [fol. 256] in which you participated as you have stated, was there ever any contention made by anybody that any allowance of cost on account of payment for travel time should be made?

A. There was not.

Q. 23. Was there, in fact, in arriving at the minimum prices, any allowance made on account of payment for travel time in the coal mines?

A. Travel time, as such, there was not.

Q. 24. Did the issue as to whether payment for travel time was a proper cost item ever come up at any stage in that proceeding?

A. It did not.

Q. 25. Mr. Luse, when were the minimum prices of coal actually established?

A. They were established twice. They were established the first time in December, 1937, and were withdrawn after being in effect seventy-two days, some time in February, 1938. The prices that came out of General Docket No. 15 were established as of October 1st, 1940, and remained in effect with certain adjustments until this past August, I believe it was the 27th.

Q. 26. Now, when the Social Security Taxes became effective, state whether or not they were included, after the effective date of the Act, whether they were included in the elements of cost?

A. Yes, that was specifically set out on the cost form, as was also Unemployment Tax.

Cross-examination.

By Senator Muse:

Q. 1. Mr. Luse, your coal selling agency sells coal from what mines in the Appalachian area?

A. We sell coal from the Minds Coal Mining Corporation, [fol. 257] which is located in Northern West Virginia. We sell coal for Gulf Smokeless Coal Company, which is located outside of Beckley, West Virginia. We sell coal for the Algoma Coal & Coke Company, which is midway between Bluefield and Welch, West Virginia, and we sell some coal from the Big Jim Coal Company outside of Harlan, Kentucky,—just the stoker coal from that mine.

Q. 2. Do you sell coal from Dr. St. Clair's mine?

A. No. I would like to but I don't.

Q. 3. This Guffey Coal Act——

A. The proper name is the Bituminous Coal Act of 1937. It is commonly known as the Guffey-Vinson Act.

Q. 4. That Board you served on was, one of its functions was to equalize or at least to set a minimum price for coal, was it not, to fix a minimum price for coal?

A. We were to assist in it; we couldn't fix it.

Q. 5. You were to assist in fixing the minimum price for coal?

A. That's correct.

Q. 6. The general purpose of the plan was to equalize the unfavorable mines with the more favorable mines in certain districts, was it not?

A. No, sir.

Q. 7. What was the purpose of it, then?

A. The purpose of it was to maintain the fair competitive opportunities and to stabilize the coal industry by returning the weighted average cost of production to the mines within the Minimum Price Area. It guaranteed no one a profit, and as a matter of fact, the high cost mines during a high cost market would have been orderly liquidated.

Q. 8. What do you mean by equalizing inequalities?

A. I didn't say that.

[fol. 258] Q. 9. You used some expression that indicated to me that one of the purposes of it was to equalize inequalities that might exist between mines in the cost of production of coal?

A. No, sir. The Coal Act of 1937 didn't guarantee anyone's business.

Q. 10. What were you trying to do on your Commission? It's not plain to me. It's probably my fault, but it is not plain to me.

A. It is complicated, Senator. That's the reason the hearings took so long. I believe I had better explain it to you this way. We first set prices as a district, as though that district was the only district in existence. That's the simplest way I can explain it to you. Then we took those prices and coordinated them with similarly established or determined prices in the other districts with which we competed.

Q. 11. How did you determine the prices for any particular district?

A. We took the sizes and the qualities of the coals and classified the coals. Cost did not enter in any way into the classification of the coals.

Q. 12. Did the cost of production enter into any consideration in fixing the minimum prices for which that coal was to be sold?

A. From a given mine?

Q. 13. From a given district.

A. From a given district, after we had classified the mines and found out by size and classification what the tonnage was in each size and classification, we then priced that size and classification, then weighted that price against the tonnage included in that classification, added up that figure with all the other sizes and classifications and got a fairly large sum of money, and divided it by the total tonnage pro-

duced in 1936, and came out with a figure of about $2.20, and [fol. 259] said that was it, and that's what we presented to the Coal Commission.

Q. 14. You all were attempting to stabilize the bituminous coal industry?

A. Yes sir.

Q. 15. Because of economic conditions prevailing in the coal industry?

A. Yes, sir.

Q. 16. That was one of the prime purposes?

A. That's what Congress said.

Q. 17. You said you had cost forms that took into consideration many factors. Am I correct?

A. That's correct.

A. 18. On that cost form, your costs did not consider the question of travel time as a factor?

A. The cost form set out no specific item for travel time.

Q. 19. If that cost form had included a specific item for travel time, you, of course, would have taken that factor into consideration?

A. Well, it didn't. I couldn't answer that. I don't know what we would have done.

Q. 20. You dealt with all the other factors on that cost form, didn't you?

A. Yes, but they were known factors.

Q. 21. Do you mean to say that the travel time could not have been a known factor?

A. It was a known factor, but it was included in the rates. In other words, in the Labor Item, which was Item No. 6 on Cost Form No. 1, that item was divided into four parts, [fol. 260] A, B, C, and D. "A" was the items that are included on hourly and day basis, other than such hourly and day basis men which are included in "B", "C", and "D." "B" was for mining, and that included all machine men and men included in the loading of coal, whether mechanical or manual. "C" included all day work and yardage, and "D" included all clerical and supervisory cost.

Q. 22. Did your commission make any investigation or was any investigation made, so far as you know, to determine the question of travel time?

A. We made no investigation, sir.

Q. 23. You simply considered the factors as they were listed on the cost forms given you?

A. That is correct.

Q. 24. And travel time was not a factor on that form?

A. Travel time as such was not set out on that form.

Q. 25. And was not considered, was it, travel time as such?

A. We considered the rates.

Q. 26. The rates for what?

A. That were in the wage agreements.

Q. 27. And travel time was not one of the rates considered on that cost form?

A. Travel time as such was not set out on that form.

Q. 28. And was not considered, was it?

A. I don't understand what you mean by "considered."

Q. 29. All you were dealing with on that form was the actual cost of production, were you not, the actual cost paid by the producer to produce his coal.

A. That's right.

Q. 30. Therefore, if the producer was not paying for [fol. 261] travel time, you didn't consider that as a factor, because they were not paying for it?

A. That's right. We couldn't include it in the cost if it wasn't cost.

Q. 31. If the operators had been paying for travel time, as such, you could have considered it as a cost factor?

A. If they had been paying for it as such, it would have been itemized there. Whatever they paid for, I am sure they reported.

Q. 32. You won't get any argument out of me on that. You simply considered the cost factors that the producer reported to you, obviously?

A. You talk about cost factors. We considered the cost reported to us on this form.

Q. 33. You considered the cost reported to you on the form, and you limited your calculations to those costs that the operators reported to you on the form?

A. No, that's not so.

Q. 34. What is so?

A. When we had these costs submitted to us, they always were six months to a year back of themselves, sometimes longer than that, I regret to say. For example, when the 1937 Wage Agreement was arrived at, we had to take the 1936 costs and adjust for the advance.

Q. 35. You made such adjustments as to bring it up to date?

A. Yes.

Q. 36. I meant the same thing.—That's all.

Re-direct examination.

By Mr. Stuart:

Q. 1. Mr. Luse, was it to the interest of the operators and your District Board to put everything into cost that there [fol. 262] was any reasonable hope of getting allowed?

A. Yes, sir, we racked our brains to try to think of anything we could that would go into the cost. As a matter of fact, we had some extra items which we threw in there, such as demurrage and bad debts and interest on bonded indebtedness, which we never could get them to allow us.

Q. 2. But nobody ever thought of trying to get payment for travel time allowed?

A. Not as such, no sir.

Q. 3. You said that so far as the cost reports that were sent in to the Board included mine labor, that those rates were based upon the Labor contracts between the operators and the Union, did you not?

A. That is correct.

Q. 4. Now, when the question got up to the Commission and the Division, did they look also, if you know, to the rates as fixed in those contracts?

A. All the contracts were put into evidence.

Q. 5. And went before the Commission and went before the Division?

A. Yes, sir.

Q. 6. And the cost determinations, so far as they referred to mine labor, were on the basis of the rates in those contracts, were they or not?

A. The cost determinations were on the basis of—of course, all the evidence in the record and as far as the labor costs were concerned, the Coal Commission never went behind the cost reports and the testimony and exhibits.

Witness stands aside.

[fol. 263] J. A. Hagy, a witness heretofore introduced on behalf of the plaintiff, being recalled, testified as follows:

Direct examination.

By Mr. Richardson: Just to check up on my bearings, I believe when we left off, Mr. Hagy had completed his testimony about Mine No. 1 and had shown the various openings on the man-trips through that mine. I think we have completed that, hadn't we?

By the Court: You so stated when we adjourned on yesterday.

By Mr. Richardson:

Q. 257. This same map, Mr. Hagy, shows also the mine workings in your No. 2 or Jewell Valley Mine?

A. It does.

Q. 258. Is it so identified on the map in some way?

A. Yes. The same pencil colors that were used in the No. 1 Mine are also used in the No. 2 Mine. The red shows the location of the man-trip routes. Brown shows the location of the places visited and portion of the mine where the party walked,—that means the parties of attorneys for both the Union and the Company.

By the Court:

Q. 259. Does the map correctly portray the location of the two mines with relation to each other?

A. It does.

By Mr. Richardson: You have the No. 2 Mine located on your map, Judge?

By the Court: Yes. I was under the impression they were a much greater distanee apart.

Q. 260. As a matter of fact, there are projections which would throw the two mines into continuous operation?

[fol. 264] A. Yes, eventually the adjacent workings would cut one mine into the other.

Q. 261. But at present they are not together?

A. No, they are not together.

Q. 262. How do you get from the mine mouth of No. 1 Mine over to the main entrance to your No. 2 Mine?

A. Go by automobile.

Q. 263. What route do you follow?

A. You follow the route passing the drift mouth at No. 1 Mine, going up and over a spur through the Jewell Ridge Camp, and there is also another route that goes up the hollow and misses the Jewell Ridge Camp. They come together about a mile north of the Jewell Ridge Camp.

Q. 264. What is the distance over the hill from the No. 1 Mine to the No. 2 Mine?

A. Following that route going almost directly north, it's about eight and a half miles from the No. 1 Mine to the No. 2 Mine, by automobile.

Q. 265. You say this map shows in red the man-trip route or routes through the No. 2 Mine?

A. That's true.

Q. 266. Have you prepared, Mr. Hagy, a memorandum that shows the distances from the several man-trip stations on this man-trip line?

A. I have.

Q. 267. The distance between the driftmouth and these several stations?

A. I have.

[fol. 265] By Mr. Richardson: I regret that I haven't a copy of this. In some way, my copies are misplaced.

By the Witness: I have a copy and also have the distances marked on this print.

Q. 268. I hand you a memorandum showing "Distance from Mine portal to Various Man-Trip Stations in Jewell Valley Mine", and ask you if that memorandum was prepared by you and if the distances shown on it are accurate, according to your calculation?

A. Yes.

The memorandum referred to was thereupon offered in evidence by counsel for the plaintiff, and the same was admitted, filed, marked as: "Plaintiff's Exhibit No. 25", and is returned as a part of this transcript.

A. According to this memorandum, the maximum distance from the portal in the Jewell Valley Mine is 14,450 feet.

Q. 269. Was it to that most distant station that you took counsel for the two sides in this litigation when they visited this mine?

A. No. In the No. 1 Mine, we took them the furtherest but in the No. 2 Mine, we did not. We took them up on Four South, which was taken thousand feet from the entrance.

Q. 270. And in arriving at that, they followed the line shown in red on this map?

A. Yes, sir.

Q. 271. Is there more than one opening in this Jewell Valley Mine?

A. We have quite a large number of openings. Most of them are driven outside for drainage. However, some [fol. 266] were driven outside for ventilation. If you will follow me—entering the portal on the main entry up several hundred feet, we see a red line going outside to the left. It's the first line at right angles off the main entry going to the left, and we have a fan out there. The attorneys visited that fan. However, the company's attorneys did not visit the fan. Going around that outcrop, which is that crooked line which winds around, which shows the edge of the coal——

Q. 272. Is it feasible to enter the mine at a place where you have a fan?

A. Yes, it's feasible to enter there.

Q. 273. That is an entrance through which men may come and go?

A. That's true. Going on around to the left there are several other openings where men may enter and following the red line it shows the track on which the man-trips run into No. 2 and 3 Ailys Branch. On the left of the main, the first red line to the right is an opening outside. That's One South Section. Going up further several hundred feet, we have another red line which shows an entry we call Three South, going to the outside, and there is an opening there where we go outside for ten or twelve hundred feet and we have another drift going inside to a section over in the right that we call Peake's Branch, and coming on around the hill to another drift going into what we call No. 3 Peake's Branch, and several other openings around the hill, driven for drainage.

Q. 274. Is it possible for men to enter the mine at these several openings you have described?

A. It is. By going up the main entry to the fourth line [fol. 267] to the right, which we call Five South, we come down to a cross entry that runs directly east and has an

oblong place cut outside from that and cut out to what we call Jones Branch. That is a cut-out where the men may enter and our plan is to cross that hollow and open another mine on the other side, and that mine can be entered on the opening we are going to start there. The drift is already timbered and everything, and as the main entry is driven on up further, it will eventually be driven two thousand feet above where it is now or maybe three thousand, and one place will be turned outside for drainage and men may enter there also. That's merely proposed.

Q. 275. Have any of your employes ever asked permission to enter the mine at any of these several openings you have mentioned other than the main portal?

A. Yes, many of them have. By that, I mean probably a dozen. They live back on the mountain and they would rather enter at these places than come to the driftmouth and get their lights. However, to date the mining department has required each man to come to the lamp house and get his lamp.

Q. 276. That is for what purpose?

A. It is a double check on the men. It is to check to see whether the man is out and check on the section boss.

Q. 277. You mean the Virginia State Mining Department?

A. Yes, Virginia State Mining Department.

By Mr. Richardson: I am leaving the map, Your Honor. Is there anything you wish to inquire about in regard to it?

By the Court:

Q. 278. I don't understand why they are permitted to [fol. 268] enter at places other than the main portal in the No. 1 Mine and not in the No. 2 Mine?

A. They asked us to have all the men enter at the main portal at the No. 1 Mine. They haven't forced us to do it, but merely asked us to, but it is customary, has been for years, for the men to enter close to the working places, and for that reason we don't want to make a man walk over this mountain in the winter time, specially when the roads are muddy and he can't drive an automobile, and just for convenience, we handle the lamps and let them go in where it suits them best at the No. 1 Mine.

By Mr. Richardson:

Q. 279. If I understand you, as a concession to the convenience of the men, by long continued practice, the Mining Department permits you to continue letting certain of your workers to enter the No. 1 Mine at various openings, but over at your newer mine, more recently opened, they require them to all enter at one place?

A. That's true.

Q. 280. And you follow the two practices at the respective places?

A. That's correct.

Q. 281. Mr. Hagy, referring to the most recent mine contract under which you have operated, what was the work day for the inside man?

A. The work day is seven hours and has been under the contract under which we have been working.

Q. 282. And I would like to digress to inquire if down to the time that the Government took over the mines on the [fol. 269] first of November, 1943, your employe relations were still governed by the provisions of that contract, except only as changed by the War Labor Board?

Counsel for the defendants objected to the question as calling for an opinion by a lay witness.

By the Court: I think it is sound as to the legal conclusion but so far as actual operation, I will permit him to testify.

A. Yes, we considered ourselves as operating under the same conditions as the contract that we had been working under.

Q. 283. Were the provisions of the contract applicable to the day to day operations at the mine applied to your work, as a practical thing?

A. Yes, it was.

Q. 284. Do you remember of any provision of the contract for a settlement of questions that arose?

A. Yes, sir.

Q. 285. Were provisions of the contract at any time invoked by any of your employes for determination of their rights?

A. No.

Q. 286. Did you understand me? Did you have any disputes or wage questions arising with any of your employes between April 1, 1943, and November 1, 1943?

A. Yes, we had controversies.

Q. 287. In those controversies, were the provisions of the 1941 wage contract used to settle them?

A. It was. It was used.

Q. 288. Used as to the grievance machinery?

A. Yes, sir.

[fol. 270] Q. 289. Do you remember any particular instance?

A. One that I have in mind, the only one that I do have in mind, if I remember right, we had a grievance over at the No. 2 Mine. This grievance—well, we had the Committee meeting in the presence of Mr. Lee Burke——.

Q. 290. Was that meeting held as provided for in the contract?

A. Yes, sir, and at that meeting, Mr. Burke had the contract in his hand and said "We are still following that contract?", and I told him I thought we were. That's the words that was spoken between us.

Q. 291. Who was Mr. Lee Burke?

A. He is the Field Representative of the United Mine Workers in that District, living in Richlands.

Q. 292. What month was that, do you say?

A. That was a meeting we had either Friday or Thursday night before the contract expired November 1st,—that is, the working agreement.

Q. 293. That was late October, 1943?

A. Yes, that would be the 28th or 29th,—either the 27th, 28th or 29th.

Q. 294. That was just before the Government seized the mines?

A. Yes, the following day the mine did not work, and if I remember right, the other two days the mine did not work and then the first of November came.

Q. 295. Was that grievance that was considered on that occasion settled according to the terms of the contract?

A. Yes, in a way, it was. We settled it satisfactorily.

[fol. 271] Q. 296. And both parties recognized the contract provisions as controlling the grievance that was being discussed?

The defendants, by counsel, objected to the foregoing question.

By the Court: Sustained, as to the legal conclusion, but I will permit him to say what he did.

A. Yes, we considered it closed under those terms in that case.

By the Court: I will strike out the answer, so far as it states a legal conclusion.

Q. 297. What did you do?

A. In that case, we considered it closed at least temporarily.

Q. 298. Did you, as a matter of fact, decide the question at issue as best you could according to the terms of the contract?

A. Yes. However, the question was not in the contract, but we were using the contract. The question was something that was a customary practice, which would be included in the contract under our working conditions.

Q. 299. The contract provides grievance machinery for settling any sort of question that may arise, doesn't it?

A. Yes, sir.

Q. 300. I want to know whether or not this particular grievance was being dealt with and was settled by you and the persons raising it according to the provisions of the contract?

A. Yes, sir, we were handling it according to the provisions of the contract.

Q. 301. Tell me, if you please, just what the contract definition of a work day for the inside men is?

[fol. 272] A. My definition—reading the contract, seven hours of labor shall constitute a day's work in the mines at the usual working places for all classes of labor exclusive of lunch period.

Q. 302. Is what you have read copied from the contract?

A. I can read it from the contract. This is approximately what's in the contract.

Q. 303. I hand you a copy of the contract if you wish to make any comparison. None of us have any question about what is written in the contract. We can all read that. What I want is to have you explain to the Judge just how you applied that in the ordinary day's work. When did the man's day's work start under the contractual arrangement?

A. Under the contractual arrangement, the seven hour day started when the man started to work in his working place at working time.

Q. 304. Did it start when he entered the mine?

A. No.

Q. 305. That is to say, unless his working place was at the entrance to the mine, he hadn't yet arrived at the place where his day's work started?

A. That's correct.

Q. 306. In contrast, do you know or can you tell where the man's day starts under the contract that was made by Mr. Ickes with Mr. Lewis on the 3rd instant?

A. My understanding, the way I read it, his day's work would start from the time he entered the portal and his day continues until he comes out at the end of nine hours.

[fol. 273] Q. 307. Between the time that contract was made and the time you left the mines to come down here, was any confusion experienced at the mines in determining just what was a man's day under the contract?

A. Yes, we had right much confusion. We didn't have any arguments that amounted to anything but many explanations had to be made.

Q. 308. Was there uniformity in the length of a man's day among the various men working for your Company?

A. There was not any uniformity in so far as the amount of time that the miner spent at his working place.

Q. 309. Was there a sufficiently clear understanding of that contract and its application to enable you to prepare your payrolls?

A. No. When I left there had not been any understanding or anything cleared so the men in the payroll office could close the payrolls.

Q. 310. Were you able to satisfy the inquiries of your individual employes as to what their earnings would be?

A. No, we were not. Evidently some one had told them that it wasn't settled and probably they didn't know, and so when we explained it to our employes, they went on and seemed to be agreeing with us that everything was very unsettled.

Q. 311. I wish again to inquire where, in reference to the beginning of the day's work, as you have explained it, under the contractual arrangement, where you required the employe to report for work?

A. We have always required the employe to report at his [fol. 274] working place.

Q. 312. And did you require him to report at any other place?

A. No other place. No other place for work.

Q. 313. You have already explained about the requirement that they enter the mine at Jewell Valley at the place where their lights are, in accordance with the Virginia State Ruling, but I understand you now to testify that there was no requirement that men report for duty at any place other than where their work is to be performed?

A. That's correct.

Q. 314. Have you explained whether the method of traveling from the mine entrance to the place where the duties are to be performed is required or optional with your employes?

A. We do not require a man to go to work at any certain—to ride any certain man-trip or anything like that.

Q. 315. Do you require him to ride a man-trip at all?

A. We do not require him to ride a man-trip. It's optional just so he gets there. If he wishes to come in any certain drift, he can do it, or catch the man-trip at any certain place, he can do it, but he does not have to come to the main portal at No. 1 Mine. Of course, at No. 2, he comes to the lamp house.

Q. 316. If he comes to the main portal, his means of reaching his working place, either by walking or riding a man-trip, is optional?

A. It is optional.

Q. 317. Is the same thing true as to coming out?

A. The same is true as to coming out.

[fol. 275] Q. 318. As a practical matter, do more of them walk out than walk in?

A. Yes, more walk out than walk in.

Q. 319. I believe you have explained that you have seventy-two men on your payrolls who enter the Jewell Ridge Mine at places other than the main portal and proceed, either afoot or on mantrips which they catch at these way-stations, to their usual working places?

A. That's true. Of course, the seventy-two varies. Some months we have more employes than others.

Q. 320. You have referred to your lamps. What kind of lamps are used?

A. We have used in the past three kinds of lamps. At the Jewell Valley Mine, we have used fifty Edison Lamps over there, and we have used about five hundred and fifty Wheat's. That figure may be wrong, but not far off, and at No. 1 Mine, we have used seven hundred Mine Portable Lamps.

Q. 321. You are using from time to time some notes that you have in your hands. Who prepared those notes?

A. I prepared them. No one else has seen them, so far as I know.

Q. 322. Where did you get the information contained in those notes?

A. It is that which I collected myself and the office force, accounting force, collected for me, and the mine foreman and section foremen.

Q. 323. That which you have assembled through the various departments of the company?

[fol. 276] A. Yes, sir, that which I have charge of.

Q. 324. You have said that you have certain Portable Lamps and certain Wheat Lamps. Both of those are portable storage battery electric lamps?

A. Yes.

Q. 325. Describe them to the Court in such way that he will understand their operation.

A. When I said Portable Lamp, I was referring to the manufacturer's name. The ones at Jewell Ridge are made by the Mine Portable Lamp Company and the Wheat Lamps are made by the Kohler Manufacturing Company and the Edison Lamps are made by the Mine Safety Appliance Company. All the lamps are similar in many respects. The Edison has a basic solution for the battery——

Q. 326. Just describe the general effect.

A. It's just a small lamp.

By the Court:

Q. 327. Are they all electric lamps?

A. Yes. The one I have weighs five pounds, is about an inch and three-quarters thick, and the width of it is about five inches.

By Mr. Richardson:

Q. 328. Have you got one down here with you so you can show us?

A. I believe there is one here.

By Senator Muse: We are going to have one here.

By the Court: Just make a note that we will have the lamp.

Witness stands aside.

[fol. 277] At this point, it being 5:00 o'clock P. M., Court adjourned until tomorrow, Friday, the 19th day of November, 1943, at 2:00 o'clock P. M., at which time the trial of this case was resumed.

J. A. Hagy, the witness heretofore introduced on behalf of the plaintiff, being recalled, testified as follows:

Direct examination.

By Mr. Richardson:

Q. 329. Mr. Hagy, at adjournment on yesterday, I believe you had described in a general way the mine lamps which are used at these two mines and had stated that they were storage battery electric lamps, the batteries being contained in a box-like container of some four or five inches in width, or did you give the dimensions?

A. I gave the approximate dimensions.

Q. 330. Give them over again, if you please.

A. About four or five inches in width and approximately, maybe seven inches in length and about one and one-half inches in width, varying in thickness from bottom to top.

Q. 331. Just in order to have the Court see it, I believe the gentlemen for the defendants have one over there, and if we may borrow it, Mr. Hagy will hold it up.

A. This is the type of lamp we use at the No. 1 Mine. We have about seven hundred of these.

Q. 332. The box in your right hand is the battery case, is it?

A. Yes.

Q. 333. And that is the case whose dimensions you have just now given?

[fol. 278] A. Yes.

Q. 334. The light is in the headpiece from which there extends to the battery a cord approximately how long?

A. About three feet and a few inches probably.

Q. 335. Where is the light itself?

A. The light itself is right here.

Q. 336. Where is that carried by the miner?

A. This headpiece has a clip on it which fastens down in the cap like that, and the lamp is carried, some prefer it on one side and some on the other, in a belt that goes around the body and a hook that holds it in position right like that.

Q. 337. Notwithstanding the different manufacturers, the lamps used at these two mines are of the same general kind?

A. They are all of the same principle.

Q. 338. Why was that sort of lamp used by this company?

A. Formerly they used carbide lights. The miners themselves furnished the carbide lamps. Safety organizations and Federal and State Bureaus of Mines wanted a better lamp for safety. They can be worn where you have gas, in the presence of gas.

Q. 339. Don't these lights give better illumination?

A. Yes, that's the principal reason, and it gives a more consistent light than the carbide light.

Q. 340. Is it correct that the company adopted this type of lamp because it provides better illumination?

A. That's why our company adopted it.

Q. 341. Is it a requirement by the company that this type of lamp be used by all inside workers?

A. It is a requirement that this lamp be used for work, [fol. 279] for the workers to work at their actual work.

Q. 342. This being a storage battery lamp, it requires recharging of the batteries?

A. It requires re-charging after each shift.

Q. 343. I wish you would explain the system of handling these lamps? Where do you keep them?

A. We have a lamp house at each mine and the lamps are kept there in this building and charged when they are not in use and that mostly is all done at night. The lamps are charged at night for the day shift, and, of course, the ones who use their lamps at night, the lamps are charged in the day time. We don't use all the lamps, we have several retired because we don't have enough employes, but the same procedure is handled at both mines of charging the lamps.

Q. 344. These lamp houses, Mr. Hagy, at the respective mines are approximately how close to the entrance?

A. The lamp house at No. 2 Mine is something over fifty feet from the lamp house to the entrance portal. At the No. 1 Mine it is something near two hundred and seventy-five feet to where the men get on the man-trip, and that's about fifty or seventy-five feet between the two distances below the main entrance.

Q. 345. Why do you provide these lamps to the men outside of the mine before they get to their working places?

A. One reason is that a man can travel better with one of these lamps with him, safer if he has it with him than if he didn't have it, and when it comes to the man-trip, it is generally early of a morning, lots of times before daylight in the winter time, and he needs a light to walk around the man-trip and walk around the chutes and such [fol. 280] as that, and as a check on who goes in the mines and who gets out, for the reason that when a man gets a lamp before the shift he deposits a check as a receipt for the lamp.

Q. 346. As I understand you, these lamps are supplied on the outside for the comfort and convenience of the men in their traveling, for one thing, and as a check on the number of men in the mine, for another thing; is that right?

A. Yes, sir.

Q. 347. Some of your men, you have said, enter this Jewell Ridge Mine at places other than the main portal and you have referred to their carrying carbide lamps. Do they work with the carbide lamps?

A. They do not.

Q. 348. How are their storage battery lamps furnished to them?

A. Those that walk in enter the mine with carbide lights where they do walk in, and remain near the man-station until the man-trip comes and there they get their electric cap lamps. The section foreman brings these lamps with him when he comes through the main entrance portal and issues those out to the men who walk in and also to the men who catch the man-trip en route.

Q. 349. On that, I wish you would explain what is the typical movement of a man upon arriving at the mine in the morning to work inside. Where does he go first and what does he do? I mean the man who expects to ride in to his place on a man-trip?

A. The man appears at the lamp house and presents a check to the lamp-house man who issues the lamps out.

[fol. 281] The check is given as a receipt and when a lot of men are there, they line up in a long row and take their turn. It only takes just a minute or two to get one of those lamps. The fellow goes up and gives the man a check and the man in the lamp-house knows the man who has given him the check ordinarily,—if he doesn't he looks on the check and sees the number, and he knows exactly where that lamp is located by experience, they are all in rotation, and a man can step within a few lamps of the one he is after, and he hands it out and the man goes on.

Q. 350. You say a minute or two. As a matter of fact, it is just a few seconds, isn't it?

A. Just a second or two. After he gets the lamp, he goes around the shop building,—I have reference to the No. 1 Mine now,—most of them go around the south side of the shop and across to the east side and on the north side of the shop is the track where the man-trips are made up, and if his trip is made up, ready to go, he gets in, and if not, he waits for the next trip, and if it is his, he gets in. A good many of the men go on down below and get in the trip and ride up.

Q. 351. Ordinarily, do the men attach the storage battery containers to their belts and the lamps to their caps immediately upon getting the lamps?

A. Yes, sir.

Q. 352. And they are then prepared to light their way as they go in the mines, when and how they go?

A. Yes, sir.

Q. 353. All those who you say enter at other places, the foreman gets the electric lights for those men, I believe you say?

[fol. 282] A. The foreman gets all the lights for the men who ordinarily work on his section that walk in. He always takes more lights than he needs, in case some one is off. In case some one is off, he will have an extra lamp, and he has a box provided for that purpose and puts the lamps in that box and takes them over and puts them in the tool car, —a tool car is a car on the train or man-trip next to the locomotive, a car that no one rides in, no workman is supposed to ride in it. It is for a safety measure that no one rides in it.

Q. 354. You say each section foreman gets from the lamp-house lamps enough for all the men working on his section

who he thinks will be there that day and who will enter at places other than the main portal; is that right?

A. That's right.

Q. 355. Who carries those lamps which the section foreman so gets from the lamp-house to the tool car?

A. The section foreman on that section.

Q. 356. Are there usually about at the time when he is getting those lamps men, company men or loaders who work on his section?

A. Yes.

Q. 357. Does he ask them or require them to carry this box of lamps from the lamp-house to the tool car?

A. No, he doesn't.

Q. 358. Do you know why he doesn't?

A. Well, they are not—if he was to get them to carry the lamps for him, he would be directing them to work. There have been cases when the foreman has hired men to carry [fol. 283] lamps in a few instances at No. 1 Mine, and so far as my knowledge goes, they were paid for it.

Q. 359. But those men, as I understand you, are not yet at work?

A. They are not yet at work.

Q. 360. So the foreman carries them himself?

A. Yes, sir.

Q. 361. The reverse of that when these lamps are brought back in the evening after the day's work is ended, how is that handled?

A. Handled in the same manner, the section foreman takes them to the lamp-house.

Q. 363. Where does he get them?

A. He collects them as each miner returns from his work inside down to the check-board or man-station, the fellows that walk in from the other side, they leave their lamps with the section foreman and take their carbide lamp and walk on out, and some of them ride out from the inside out to the drift or maybe through the second tunnel and get off there, and in that space, where they are riding, they are not using any lights. I have seen that happen.

Q. 364. In arriving at the outside, who takes the box of lamps from the tool car back to the lamp-house?

A. The section foreman.

Q. 364. Again there are usually about men who have been working under him on his section all day?

A. Yes. He takes the lamps of the men who have been working under him that day and did not ride the man-trip back, but got off some where over on that side of the hill and went home.

[fol. 284] Q. 365. How are those man-trips arranged?

A. We have made numerous changes in man-trips, trying to get the best method to handle them, in the past year. Along about August, along about that period, we had one long man-trip that ran the longest distance, that left the driftmouth first. That was a trip that went over to the Parallel Sections,—that was the most distant. The second trip went to One North Section down towards Gravel Creek. Each one of those long trips would divide, so many cars cut off with the men that went to these other sections. Two North on the Parallel trip, there was a few cars cut off there.

Q. 366. Let me ask you this: Is it a fact that the more man-trips you have, the more hazard there is in the movement of the trips?

A. I think so. That's my opinion.

Q. 367. Is it your effort to keep to a minimum the number of man-trips?

A. We do.

Q. 368. And do you schedule those trips? Do you schedule the movement of those man-trips?

A. Yes, these man-trips are scheduled.

Q. 369. How are the schedules worked out?

A. The man-trips that travel the furthest distance, we attempt to get it out first and the man-trip that travels the next furthest distance, we try to get it out next, and the one that travels the shortest distance is last.

Q. 370. Approximately what distance do you try to maintain between the trips?

A. We try to maintain five hundred feet at least. We [fol. 285] have a rule that they should not be any closer than five hundred feet apart.

Q. 371. Do you have a dispatcher in each mine for the purpose of keeping up with the movement of these trips?

A. We do.

Q. 372. Do you have a telephone system?

A. Yes.

Q. 373. An orderly arrangement by which the men in charge of the trips can keep in touch with the dispatcher's office?

A. Yes, we have an orderly system in which the man-trips are run.

Q. 374. Are the man-trips carefully supervised for safety and direction and dispatch?

A. Yes, I think they are.

Q. 375. Who is in charge of each man-trip?

A. The section foreman, but generally speaking, the motorman and brakeman on that man-trip is in charge.

Q. 376. Are there any rules that the section foreman prescribes or requires observed in connection with the man-trip?

A. I would say that a section boss on a man-trip is right much like a conductor on a train. He directs the motorman and the brakeman who are pulling that trip and supervises the safety of all who ride the trip.

Q. 377. You explained a while ago that the trolley wire is suspended above the tracks but closer to one of the rails than the other. What, in that connection, does the foreman see to?

A. The foreman sees that each man who rides that trip sits in the man-car on the opposite side from the trolley [fol. 286] wire. That's a safety measure.

Q. 378. How about the number of persons in a car?

A. We do not—I don't think we have a written rule how many should ride a man-car, but the section foreman,—it is his duty to supervise and see that not too many men get in one man-car, not enough to crowd them too much.

Q. 379. You have referred to a car in which tools are carried. Explain to the Court about that, please.

A. On each trip we attempt to have a car for tools only. The tools are brought to the shop for repairs or new tools are taken in, the lamps are taken in or some new man going in with a set of tools, they are all put in one car. That's the tool-car and it is hauled in to the section and no one rides that car for safety reasons.

Q. 380. Is any direction given by the foreman in charge of the man-trip to the individual men as to who shall get into each car?

A. I wouldn't think he gives any requests like that. The only time he would say anything like that, in case he saw too many men getting in one car and he might ask one of

the fellows to move over to another car for a safety measure.

Q. 381. Are the cars coming out at the day's end likewise scheduled?

A. Yes, they are likewise scheduled. The schedule is not maintained, of course, on the evening shift as rigidly as it is on the day shift. Right at the present time, we run them as near as we possibly can but formerly, before November 1st, in case some man was late, or something like that, they might wait on him a minute or two, but they run as near as they can on schedule now.

[fol. 287] Q. 382. What time of day did you say your first man-trip which is arranged to go to the most distant section left on the trip?

A. The man-trip going to the Parallel Section was scheduled to leave at seven o'clock in the morning, and as soon as it leaves, the following trip pulls up and will follow out two or three minutes later.

Q. 383. What time did your regular shift of the men who rode that man-trip begin?

A. The working time began at eight o'clock.

Q. 384. And the following man-trips would come at scheduled time of departure following that first one?

A. That's true.

Q. 385. In the evening when they were coming back, you say they were likewise scheduled and I take it from that these man-trips would leave the designated places at stated times?

A. Yes.

Q. 386. If a man wanted to ride out on that man-trip he would have to be there at that time?

A. Yes. At times when a man in this man-trip had some little job to do, occasionally there would be a man-trip to take care of that man who was behind and occasionally you have a slate fall and there would be a man-trip to take care of the men in that section.

Q. 387. Suppose a man arrived late and missed a man-trip, would that deprive him of the day's work?

A. No. I have never known of any one being deprived of a day's work by getting there late, because the gathering [fol. 288] motors, one might be in the shop for some minor repairs, or something, but in case some man misses a trip, we always provide some means for him to get to work.

Q. 388. Is he free to ride another man-trip to a section or junction nearest his place of work?

A. Yes, sir, but it is convenient for a man to ride the man-trip going his way, because if he misses that trip, he would have right much difficulty in getting to work.

Q. 389. Who operate the motors by which these man-trips are moved?

A. The regular motorman and brakeman who operate that motor during the shift.

Q. 390. They are the main line motormen?

A. The main line motormen were pulling the trips, all I have talked about is No. 1 Mine,—the main line motormen were pulling the man-trips at No. 1. Since November 1st, they rarely ever pull it. The man who runs the gathering motor on that section and his brakeman pull it.

Q. 391. Does that section motorman who pulls the man-trip begin his day's work when he commences to pull a man-trip?

A. Yes.

Q. 392. You just referred to the fact that what you have said applies to the Ridge Mine. If there is any difference between the arrangement that you have described there and that followed at the Valley Mine, I will be glad for you to point that out. I had thought that what you said was applicable to both.

A. At No. 2 Mine, I never have known of a main line [fol. 289] motor to pull a man-trip. I guess they have under necessity but I just don't know of it. The gathering motors pulls the man-trip on to his section and that afternoon, he returns with the man-trip.

Q. 393. Those are experienced motormen well trained in the handling of motors and man-trips?

A. They are.

Q. 394. What can you say of the speed at which those trips are handled?

A. Well, we have a rule that man-trips shall be handled at six miles per hour.

Q. 395. You mean not exceeding six miles per hour?

A. That's the rule. We try to maintain that. Some motormen do maintain that and some will coast down hill faster if you will let them. It takes right much discipline to hold the speed of your man-trips down. They can't go so much faster. Most of the motors you purchase have a rated speed of some where between four and main haulage motors eight miles an hour. When a person rides in-

side the mine, it seems they are riding much faster than they are outside. For instance, at the No. 1 Mine, I notice every time I ride a trip going through the tunnel, I think I am going pretty fast, and the minute the motor gets on the outside, it seems like it stops. It's like riding an automobile going through a culvert, you seem to be going pretty fast, and there is a whole lot of that in a coal mine.

By the Court:

Q. 396. What is the gauge of your railroad?

A. Forty-four inches, and the size of your rails is seventy [fol. 290] pounds on the main line and forty-five on cross-entries, secondary entries, and thirty pounds on your room and room entries, thirty pound rail.

By Mr. Richardson:

Q. 397. I neglected to ask you: These man-trips are made up of the ordinary mine cars in which you haul the coal, are they not?

A. Yes, ordinary mine cars.

By the Court:

Q. 398. About how many cars in a train?

A. When we use one haulage locomotive to pull several, some times there will be fifteen or twenty, but with the gathering motors we are using at present, we will have four or five or six, depending on the number of men you have on that section.

By Mr. Richardson:

Q. 399. I wish you would give the dimensions of those cars?

A. I have a blueprint with me of those cars and also have a picture. They are about twelve feet inside——

Q. 400. Let me suggest that you get your blueprint and supply the dimensions of the cars and furnish the blueprint for the gentlemen for the defense, for such use as they may make of it.

A. The mine car is about twelve feet long inside, seven feet wide inside, and some of them are twenty inches above the rail, I believe. I have this one right here,—up to

twenty-four inches above the rail. That's the total height of them.

By the Court: You needn't both- about any illumination to me about mine cars. I tried a patent case involving mine cars and learned all about mine cars I ever want to know.

Q. 401. You have given the outside dimensions of the [fol. 291] car, I believe.

A. I gave the inside dimensions. The outside of the car is thirteen feet long.

Q. 402. By how many feet wide?

A. Seven feet four and one-half inches, outside dimensions.

Q. 403. The bottom of that car on the inside, the lowest pointed, is how much wide?

A. The lowest part of that car is two feet and six inches. That's the lowest part, down between the rails.

Q. 404. And then, alongside of that on each side, rising above it on a sort of bench is an area how wide?

A. That area is two feet three and three-quarter inches.

Q. 405. That's referred to by the men in the mine as the "bench" or "mourner's bench", isn't it?

A. Yes, I think so. I have heard that term.

Q. 406. And above that rises the sidewalls of the car?

A. Yes.

Q. 407. To what height?

A. That rises eleven inches from the bottom of that bench up to the top of the car. This however, is a low car, the same as Jewell Valley and the Bethlehem Steel car at No. 1, but the cars we bought from Enterprise and use at No. 1 Mine are a little higher,—about four inches higher.

Q. 408. Where a man is riding in one of these cars, where does he ordinarily sit?

A. At the No. 1 Mine practically all the time he sits up on the bench, and at the No. 2 Mine, some sit on the bench [fol. 292] and some sit down in the bottom.

Q. 409. How high is the bottom above the ground?

A. The bottom is four inches above the rail, than the bottom of the bench is nine inches above the top of the rail.

Q. 410. Mr. Hagy, you have said that the miner who works inside and expects to ride a man-trip ordinarily stops at the lamp house and passes in a check as a receipt

for his lamp and takes his trip and moves on in. Where does that man report for work or check in for his actual day's work?

A. He checks in at the check-board inside but reports for work in his working place.

Q. 411. Where is that check-board?

A. That check-board is—generally, in each section of the mine, it may be a little different, but generally it is on the section where the man-trip stops. The man puts his check right on the board and goes to his working place. Some of them who need powder will go to the powder house and then go on to the section.

Q. 412. There is a check-board maintained on each section for the checks of the men who work on that section?

A. That's right. However, there is an exception to that. Over at the No. 2 Mine, they have some check-boards over there but there are sections where the section boss calls the roll instead of checking on the board.

Q. 413. Where you have the check-board on the section, how does the man check in for his day's work? What does he do?

A. Gets off this man-trip and goes to the check-board and hangs his check on the board.

[fol. 293] Q. 414. What is that check?

A. It's the same check that he puts on his mine car.

Q. 415. That's a metal disk that bears his number?

A. Yes, sir.

Q. 416. And he hangs that on the board which is maintained on his section for the purpose of recording the men who are present on that section; is that right?

A. Yes, sir.

Q. 417. Does that bear the same number as the number on his lamp-house check?

A. Yes and no. We try to give each man the same number lamp as he has company check number.

By the Court:

Q. 418. Does the lamp itself bear a number?

A. Yes, sir. But that isn't always true. If you have a lamp that gives out, goes out of service, you have to give him a substitute. We try to do that and generally do, but these lamps are like everything else that needs service, they fail every now and then, and the way we do those, they are

sent back to the manufacturer and repaired. The majority of the repairs we don't do ourselves.

By the Court:

Q. 419. How many checks has a man got, ordinarily?

A. He ordinarily has around ten.

Q. 420. Carries those with him?

A. Yes, he generally carries enough checks, in case something happens that he doesn't get his coal dumped, that he will have some more checks the next day.

[fol. 294] By Mr. Richardson:

Q. 421. You are speaking of the ordinary coal loader who uses the checks to tag the cars he loads?

A. Yes.

Q. 422. A company man wouldn't have occasion to carry that many checks, would he?

A. No. When you go on a section, the company man never tags, just the coal loaders.

Q. 423. How does the company man report in?

A. He generally sees the section foreman some where enroute on the man trip and he goes and gets his tools, some sections have a tool house and some don't, some keep them in break-throughs, and he generally gets his tools and comes up and sees the section boss or the section boss sees him. Lots of times maybe he knows something he wants done in a hurry and he will go straight on and go to work to help some coal loader get started.

Q. 424. Is this check-board or checking-in place the first place the section foreman knows accurately just who is to work during the day on his section?

A. That is right. He does not check the check-board inside the lamp house that morning. When he comes out in the afternoon, when all the lamps are put up in the rack, the man in the lamp house looks over the board and sees who hasn't got his check and he might be afraid that man is inside and he goes out and tells the mine foreman "Check Number so and so is not out",—that man might have gotten sick or something and gone around the hill. It is a check to see that nobody is left inside.

Q. 425. You have referred to the roll call system at [fol. 295] Jewell Valley Mine. Explain where that roll is called.

A. That roll is called just at the place where the men board the man-trip, coming outside.

Q. 426. Or where they alight when they go in?

A. Yes. I don't believe they call it when they go in in the morning. The section foreman looks over the men and sees who is there. They may call the roll. I don't know.

Q. 427. Where does he do that and make his check of the men present, either by count or roll call?

A. The section foreman can do either one, but he must make a check, by count or roll call, as he prefers.

Q. 428. Does he do that at the destination of the man-trip?

A. He generally does. At least, he does from his memory. He can tell just by glancing over the trip who is in. His memory will recall anybody that is off.

Q. 429. I believe you said that the section foreman was a time-keeper and kept the time of the men who were working on his section?

A. The section foreman keeps all the time of all the men working on his section unless it's a wire man or somebody sent there by the general mine foreman, and in that case, the general mine foreman keeps it.

Q. 430. Where does he prepare the list of the men present for keeping their time, in the morning, I mean?

A. In the morning, the section foreman marks off the company men's time before the section foreman goes inside, and he assumes that everybody is going to be on. In case somebody is off, he telephones the office and makes any [fol. 296] change necessary. I am talking about the company men.

Q. 431. You mean he makes a list of all the company men he would expect to work that day, whether he has seen them or hasn't seen them?

A. That's right.

Q. 432. And if, on going inside, any of those men happen not to be present, then he checks them off and reports them?

A. Yes, he calls the office by telephone and tells them who is on and who is marked off the sheet he turns in. However, the coal loaders, he turns their time in at night for that day.

Q. 433. Where, in the morning, does he prepare the list of the coal loaders present?

A. The section foreman doesn't prepare the list of the coal loaders present until some time during the day, in the afternoon,—that is, on his time sheet. He never knows what coal loaders are going to be on because the coal loader comes in and hangs a check up and they are gone to the working place, and lots of them he never sees until he goes to the working places.

Q. 434. And he determines during the day from a check of the section check-board who is at work?

A. Yes.

Q. 435. Are the practices you have described followed at the Jewell Valley Mine, too?

A. Yes, as far as keeping the time is concerned, the same procedure. However, over at No. 2 Mine, one or two of those sections are so far away from the telephone they can't call the office. We have had a little difficulty in getting wire and such as that during the last few months, and the [fol. 297] motorman brings the time out and gives it to the dispatcher and he telephones it in.

Q. 436. But the section foreman prepares his list of the persons working in the manner that you have described?

A. Yes.

Q. 437. You have referred to the tool box where the company men working on the respective sections pick up their tools. Where is that in reference to the end of the man-trip?

A. It is right near the man-trip station. As I mentioned once before, all sections don't have tool boxes in the sense of a box; most of them, a good many of them do. Some of them have a place in a breakthrough that they take the tools around and put them there, so when they come back the following shift, they will know where to go and get them. They bring these tools close to the closest place they have to start the next morning. A bender, they never carry it, it is too heavy to lift. They leave it where they think they will need it the next time, but some tools they generally bring out to the tool-house next to the man-trip station.

Q. 438. Where do the coal loaders leave their tools?

A. In the working place. They do not bring them out unless they bring them to have them repaired or sharpened in the blacksmith shop, unless they know they are going to change places.

Q. 439. What sort of tools are carried in the tool-car?

A. Augurs, picks, anything that is taken outside to be repaired or sharpened and brought back in. In case some fellow leaves to go to another job, they bring his tools in the car.

Q. 440. Whose tools are they?

A. They are the coal loader's. No other tools can be [fol. 298] put in there.

Q. 441. Who puts them in and takes them out of the man-trip car?

A. A coal loader generally looks after his own tools. Some times he asks the motorman to do it and the motorman will do it for accommodation, but generally, he looks after them himself.

Q. 442. From the end of the man-trip, the men proceed to their usual working places afoot, do they?

A. Yes, sir. Some times some of them will catch a trip going up in that direction and ride to the mouth of the place. I have had section foreman, in case somebody wants to do that, to let them ride as close to the working place as they can.

Q. 443. That doesn't ordinarily amount to much?

A. No, the furtherest, I would say, would run around fifteen or sixteen or seventeen hundred feet from the place they get off the man-trip, depending on the height. We try to run them as close as we can so they can get to the place at an adequate time.

Q. 444. You have referred to explosives that you use at the Jewell Ridge Mine. I believe you have already explained that they are kept in a main magazine outside and such as may be requisitioned each evening by the coal loader for the next day's work is brought in at night and placed in the section magazine?

A. Yes, sir.

Q. 445. You have explained that in your evidence, have you?

A. Yes, sir, and the following morning the section foreman issues it out to who the powder is to go.

[fol. 299] Q. 446. The section powder magazine is near the section toolbox, is it?

A. Generally, it is. The powder magazine has to be a building that will not burn and for that reason, we use cinder block or stone or something like that to build this powder house out of. In there we keep the electric caps and

powder and we generally try to locate that as near the center of the section as possible.

Q. 447. So that each coal loader will pick up his powder and take it from that point to the room or working place where he is employed?

A. That's correct.

Q. 448. Over at No. 2, you explained, I believe, that they use Cardox?

A. Yes, they use Cardox over there.

Q. 449. Where is that delivered to the men?

A. It's taken up on the section by a man who runs what we call the powder motor, the same as we do the others.

Q. 450. Is he a company man?

A. He is a company man and he takes it up there and puts it in a little box prepared for this Cardox and the motorman on that section picks them up there and delivers them to the working place where they are needed, and when he does that, he collects a little check as payment for the Cardox.

Q. 451. Did you make a calculation of the average travel time required for all of the men in each of these two mines?

A. I did. I did with the Safety Engineer, the Mine Foreman and a couple of company men as assistants.

[fol. 300] Q. 452. Let's deal first with the Jewell Valley Mine, if you please. I hand you here a memorandum showing "Estimated Time-Portal to Portal-No. 2 Mine, as of July 6, 1943". Is that memorandum your work?

A. It is my work and the assistants I had helping me. The assistants I had helping me were Clay Thompson, Safety Engineer, Johnny Long, Assistant Safety Engineer, and the mine foreman and night foreman.

Q. 453. It was done under your supervision?

A. Yes.

Q. 454. Is it prepared to show the overall time of travel for men working in the various sections of that mine from the main entrance or portal to their working places and return?

A. Yes.

Q. 455. Using your memorandum as a guide, I wish you would explain how you determined the travel time required for the movement of each of these employes?

A. The first I knew about getting this travel time, I was instructed to get what the travel time would be on those

various sections without telling the motorman or any one we were timing the trips for a week. We timed the trips and took the average of the exact time it required the motorman to make the trip and then we had no way of determining how long each man walked from the man-trip to the place unless we had some one checking each man. What we did, each one of the ones I had helping me walked those distances, as he would come down to the room, he would take the time, on down to the next one, so after we timed, for this date approximately, this was about two or three days after the timing was all made that this report was [fol. 301] made, and that's what it was then. It changes from day to day. Some places gets shorter and some longer. It depends on whether you are advancing or retreating,—so the time it takes from the working place to the man-trip or the man-trip to the working place is approximately correct. One man will walk faster than another, or one fellow maybe since the time this report was made might have a breakthrough or one room cut from the entry to another, to come more quickly than this, but this was as correct as we could get it.

Q. 456. What you have done is to take the aggregate of man-minutes consumed in travel in this mine and divide it out so as to give an average number of minutes of all the men in the mine required for traveling from the entrance to their working places and back?

A. Yes.

Q. 457. Now, beginning at your first section indicated, First South, what time does your man-trip leave the outside for the day's work?

A. I don't have my definite figures with me on that, but it leaves some where between seven-ten and seven-thirty. On this, I don't have any record with me of when that man-trip leaves except the time it takes it to make it.

Q. 458. This memorandum was prepared from accurate data, wasn't it?

A. Yes.

Q. 459. This has it scheduled at seven-twenty.

A. I don't have the same one you have. One is a re- [fol. 302] copy of the other and the time is left out of the one I have.

Q. 460. Mr. Hagy, will you answer my question?

A. Here the man trip averages leaving at 7:20 and comes out at 3:40 for that week.

Q. 461. Follow through and show the method by which you have arrived at the average number of minutes required by each of the men for his travel.

A. The man in this case goes in at 7:20 and comes out at 3:40, takes thirty minutes for lunch. I believe that's the way these are figured. That makes him fifty minutes times nine loaders and seven company men so it gives him four hundred and fifty minutes travel time for the loaders and three hundred and fifty for the company men.

Q. 462. That is to say, you have taken the time required to carry the men at each section from the entrance to their working places, multiplied that by the number of men on that section and found the total number of minutes on that section?

A. Found it for that section for both loaders and company men.

Q. 463. And in like manner you have found the total number of man minutes travel time for all men on each of the sections?

A. Yes, sir.

Q. 464. And then have you averaged it for the entire mine?

A. Averaged it for the entire mine.

Q. 465. What general average did you get for all the men working in the Jewell Valley Mine?

A. Sixty-seven minutes.

Q. 466. What does that 67.1 minutes represent?

[fol. 303] A. That represents the time it took, leaving the drift mouth, to get to the sections and the men to get to the places, plus the time it takes in the afternoon to get from the places back to the mantrip and ride the mantrip to the outside.

Q. 467. Stated another way, doesn't that represent the overall time from portal to portal, less the lunch hour?

A. Yes, and work time.

By Mr. Richardson: We should like to file in evidence the memorandum described by the witness.

The paper was thereupon filed, marked as: "Plaintiff's Exhibit No. 26", and is returned as a part of this transcript.

Q. 468. And here, Mr. Hagy, is a comparable memorandum relating to Mine No. 1. Did you likewise prepare this?

A. Yes, sir, likewise prepared this and it is prepared in the same manner. Both of these include all the men that work in the mine, motormen, main line motormen, pumpers and everybody that works in the mine.

Q. 469. What is the average travel time for the men computed in that way at your No. 1 Mine?

A. Eighty-eight minutes.

By Mr. Richardson: We should like also to file this as an exhibit.

The paper referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 27", and is returned as a part of this transcript.

Q. 470. By way of checking on the mantrip time, have you [fol. 304] made any actual checks or any checks on the actual time for the movement of these man trips from the mine portal to certain sections?

A. Yes, we have had two men, one of them working each day the mine works on this and the other just when he had an opportunity, checking each section on which we pull man-trips, and that's over a period of about two months,—something like that, I have the dates, all of it in detail that I can refer to. I have a list through from September 14th to November 1st in the No. 1 Mine that I made a thorough study of.

Q. 471. This may be repetition, Mr. Hagy, but at the end of the day, do the coal loaders have any particular place or order in which they check out?

A. The coal loaders, at the end of the shift, they come down and get their checks off the board, but in case they clean up or quit work before the shift is over with, they have the privilege of coming down to the check-board and getting the check and walking out and walking home or waiting for the man-trip, whichever they prefer. Quite a number come out and walk from the drift up on the mountain and around the road and go home before the shift is over.

Q. 472. Without waiting for the end of the shift or the mantrip?

A. Yes, sir.

Q. 473. Are they entirely at liberty to do that whenever it suits them?

A. Yes, sir.

Q. 474. And to go out whenever they care to do so?

[fol. 305] A. Yes, sir. We try to encourage them to stay and work some where else and get another ton of coal out. Some of them will.

Q. 475. That's optional?

A. Yes, sir.

Q. 476. Do you ever have incidents of men going in the mine, who, for reasons of their own, decide they don't want to work that day?

A. Yes, we have men who do that, men who go in to their places and decide after they get there that they don't want to work, or find some one has let some slate fall, or something like that, that they won't clean up, thinking the other man hasn't treated them fair. I have reference to double shift places, in this statement, or some place the machine didn't cut and they didn't have any coal there, rather than go to another place, they walk out.

Q. 477. If the man is deprived of the day's work by reason of some condition or act beyond his control, I believe the contract provides at least two hours' pay for the man?

A. That's a company man. If the coal loader goes in his place and something there deprives him of working that day, we send him some where else to work, and if he works that day, he will get credit for his full time on time and a half rate.

Q. 478. But he doesn't have to work unless he wants to?

A. Yes, sir.

Q. 479. And goes on back out?

A. Yes, sir.

Q. 480. And in that case, is he paid anything for that day?

[fol. 306] A. No, not unless he works.

Q. 481. But he has spent his time going in and coming out?

A. Yes.

Q. 482. Let me go back to the lunch time. I believe heretofore that has been half an hour?

A. Yes.

Q. 483. By the November 3rd Agreement, it was reduced to fifteen minutes?

A. Yes.

Q. 484. Going back to the half hour period, where will he eat his lunch?

A. Ordinarily, a coal loader will eat his lunch all along as he has a spare moment during the shift. Some will wait

until it gets about twelve o'clock and come to a breakthrough and sit and eat lunch. Company men will generally have lunch when they are at the mouth of the entry, where they take the hour that is most convenient to them.

Q. 485. You mean half hour?

A. Yes.

Q. 486. During the lunch period, the company man is entirely free of any duties or requirements by the company?

A. Yes, as long as he don't have an emergency, he is.

Q. 487. And the coal loader being a piece worker is at liberty to take his lunch whenever he wants to?

A. Yes.

Q. 488. I want to know if the company man or coal loader is any more free from requirements by the management during his lunch period than he is while he is traveling in [fol. 307] and out of the mine?

A. I would say his freedom would be about the same when he is traveling in and out as it would be at the lunch hour.

Q. 489. As I understand you, nothing is asked of him at either time in the way of work?

A. No.

Q. 490. But both times, he has to comply with the requirements as to safety?

A. Yes.

Q. 491. And at both times, he is subject to the same general conditions?

A. Yes, sir.

Q. 492. I believe these Exhibits Nos. 26 and 27 which you have filed show that there is a variation in the travel time for the men on the different sections?

A. The travel time is different for each section.

Q. 493. But under the contractual system that obtained down to the third of this month, the work day was constant for the workmen all over the mine, was it not, the period of time in the work day?

A. The number of hours was the same, except those who worked overtime handling man-trips or in cases of emergencies and things like that.

Q. 494. Now, to shift from a face to face basis to a portal to portal basis would make a variation in the work day, would it not?

A. Yes, it would make considerable variation in the work day as to the productive time in the working place.

[fol. 308] Q. 495. By that you mean the productive work day, the time spent at actual productive work?

A. Yes.

Q. 496. Would or not that result in different rates, depending upon where they might be working in the mine?

A. I have not learned anything of the present arrangement, the way that the employes will be compensated, but I would think that it would. I would think when it works out, it will be balanced some way or other. The way I understand it now, it would not be balanced. For instance, a man working in a place near the drift mouth where he would have very little travel time would be loading coal and have some advantage over the man who has to ride a long way and would only get to work probably seven hours a day while the man at the place that is close might get to work eight hours a day. It makes some difference, so I don't know what arrangement will be worked out on that, but it is my idea there will something have to be done in a manner so it will compensate, to make his earnings some where near the fellow who has the advantage.

Q. 497. Actually, Mr. Hagy, do you know how the thing would be worked under the proposed arrangement?

A. I do not know.

Q. 498. I believe any authoritative instructions as to how it would work has not yet come out?

A. We hadn't received any when I left Jewell Ridge.

Q. 499. Have you any general figures on the percentage of overall producing cost at these mines represented by the direct labor cost?

[fol. 309] A. Yes.

Q. 500. Approximately what is that percentage?

A. Yes, for several months I have checked on it and it runs right near eighty per cent, the labor cost is about eighty per cent of the cost of the coal at our mines. It has gone up considerably lately due to the man power shortage which results in less tonnage.

Q. 501. Do most of your employes reside on company-owned premises?

A. No, most of our employes live off the company premises.

Q. 502. Where do they live, Mr. Hagy?

A. We have busses that haul our employes from the surrounding country. We have one that runs from Tazewell and I believe we have one that runs from Abb's Valley and

several running from around Richlands and several from Cedar Bluff and about two or three busses and trucks from Honaker, one off of Garden Creek down in Buchanan County to the Jewell Valley Mine, and another that goes through Short's Gap, from Raven through Short's Gap, through the Bill Young Gap to the Jewell Valley Mine, and one from Bradshaw, West Virginia, up to the No. 2 mine. I have a list of those and the number of men they haul and how far they make the trip.

Q. 503. You have a list prepared showing that?

A. Yes.

Q. 504. Let me see it, please, sir.—Mr. Hagy, have you prepared a memorandum showing the number of men who are transported at the expense of the plaintiff company to [fol. 310] the respective mines where they work in busses or pick-up trucks?

A. I have. I had Mr. J. H. Miller, our personnel Director, who also has the rationing of gasoline to all the people in our section of the country who use busses and trucks to haul employes to and from the mine, I had him to make up a list for me.

Q. 505. I hand you a memorandum showing the names of various persons, the names of operators, numbers of men, mine workers transported, the route and mileage, and ask you if that is a memorandum prepared by you or under your supervision?

A. It is.

Q. 506. And from the records of this company?

A. It is.

Q. 507. Does that memorandum show the number of men transported to the respective places of mine operations at Mine No. 1 and Mine No. 2 and the distances these persons are hauled?

A. It does. As an exception to that, though, the distances shown here are the distances reported by these bus drivers and truck drivers to the Rationing Board there for gasoline certificates, and we pay these men that haul the employes, we pay the rides for these men at the rate of a cent and a quarter a mile up to a maximum of fifty cents. After it gets over a certain mileage, we pay fifty cents a day for the rides of these employes. There are quite a number of others who ride but they ride in their own cars. This is a list of the employes we pay for to ride to and from their work.

Q. 508. How many men altogether are hauled to Mine No. 1?

A. I had the list just a second ago and this list shows [fol. 311] No. 1 Mine, one hundred and seventy-six men.

Q. 509. And No. 2 Mine?

A. Number Two Mine, a total of two hundred and forty-five men.

Q. 510. What arrangement do you make for having those men carried? Do you contract with the owner of some vehicle to bring those men to their work and return?

A. We contract with the owner of the vehicle to pay him so much for hauling these men to and from work.

Q. 511. In general what types of vehicles are used?

A. At the No. 1 Mine, we have seven trucks, boxed up with seats in them so that they will haul from about ten up to about sixteen or eighteen men, and then we have three busses that run at No. 1 Mine, two on the day shift and one on the night shift.

Q. 512. I see you have here the name of "Bus Operator" over on the left hand side. Are any of these bus operators themselves inside employes of your mine?

A. They all are employes, I believe, with some exceptions: This C. C. Selfe Bus Line is—he has some of his drivers who work in the mines and run outside. Some of them do not. The same applies at the No. 2 Mine, one bus hauls miners back and forth and spends the time between the time the men go to the mine and the time they leave the mine running a passenger bus between No. 2 Mine and Richlands.

Q. 513. And these men, some of them your employes operating their own vehicles, haul other employes to the working place or the mine where they work and you pay them at [fol. 312] the rate you have stated for that service?

A. Yes, sir.

The memorandum referred to was thereupon filed as an exhibit on behalf of the plaintiff, and the same was marked: "Plaintiff's Exhibit No. 28", and is returned as a part of this transcript.

Q. 514. Others of your employes, I take it, use their own means of arriving at the mine where they work?

A. Yes, they do.

Q. 515. And a considerable number of employes live on company premises?

A. Yes. I have a list of houses. In checking our map at the mines, not this map, I counted at the No. 1 Mine one hundred and seventy-one residences where miners live and work in the mines. Of that number, there will be a few that work in the office. Out of that one hundred and seventy-one residences, I don't have a check on it, but there should be around two hundred employes who live on the premises at No. 1 Mine. At No. 2 Mine we have one hundred and five houses. We have thirty-five that are always full and a lot of double houses and a good many of those stay empty. The house count I had there was twenty-six empty and we should have around one hundred employes who live in the camp at No. 2 Mine. All these are numbers on the payroll. That doesn't mean the average number that works. It's the number on the payroll.

Q. 516. Are the entrances to your mines located at the most conveniently accessible place from a standpoint of a majority of these men?

[fol. 313] A. Yes; I think so, with the present roads, the most convenient place.

Q. 517. Has there ever been any attempt made to provide other entrances or portals?

A. There has been some thought along that line but no action has been taken.

Q. 518. Could you conveniently establish other places accessible to roads that the men could use the year around?

A. It's possible. It would be rather expensive in the mountainous country that we have. The mountain roads would have to be improved so they would be all weather roads, it would be quite a distance further and with all our roads on top of the ridges, other roads would have to be graded down to the various drifts, various entrances, and there would be right much road grading in order to change or make other openings where the men would all get in a road closer to the working places by way of automobiles.

Q. 519. Speaking generally, do you think very much could be done in the way of shortening the travel time in those mines?

A. Not very much unless that work I just mentioned would be completed by building roads and making other openings and probably changing tipple sites or something.

Q. 520. The memorandum you used on your Exhibit 28 showed the number of men that are transported. Are they

likewise carried back in the afternoon after the day's work is done?

A. Yes, sir, they are.

Q. 521. And the distances which are carried forward in [fol. 314] the right hand column are the round trip distances?

A. The round trip distances.

Q. 522. And the rates you have stated are the amounts the company pays to the operators of the carrying vehicles for the round trip?

A. That's right. A maximum of fifty cents and it ranges something near a cent and a quarter a mile and that which goes up over fifty cents, the employe pays the man himself in case there is an extra charge.

Cross-examination.

By Senator Muse:

Q. 1. Mr. Hagy, about how long would it take the average miner, after coming out of the mine, to wash the dirt off that he gets in that mine and clean up?

A. It takes a right little while.

Q. 2. About how long?

A. A whole lot of the time depends on where he washes. Over in our camp, we have pretty bad water.

Q. 3. I am assuming that he is trying to get clean, about how long would it take?

A. I have never timed myself. It would take several minutes.

Q. 4. Take half an hour, wouldn't it?

A. No, I don't think so.

Q. 5. The trip we made, didn't you take us to the highest point of the mine, where the roof was the highest above the passageway?

[fol. 315] A. The day that I took you over there, I took you to a section where there are five, six, seven, eight, nine, ten, eleven, twelve, thirteen cross entries off of the Main Parallel. The height over there is something near the same on that entire section as where I took you.

Q. 6. Isn't that section among the highest sections in the mine?

A. Yes, it is.

Q. 7. You didn't take the attorneys in the case over in the lower sections of the mine?

A. I took the attorneys in the same places that I took you gentlemen, with the exception of up in the face of Ten Right.

Q. 8. I know you took the attorneys to the same place. Did you take the attorneys to that portion of the mine that was the lowest?

A. No, I did not.

Q. 9. You took us to the most available part of the mine, didn't you, from the standpoint of walking, the most favorable portion?

A. As far as the standpoint of walking it, yes.

Q. 10. The part of the mine you took us to, was there very many places the attorneys could walk standing up or did they bend over as much as they could, with their heads down towards their knees?

A. They bent over much further than a man experienced would have bent, but it is true you had to bend over.

Q. 11. You mean in walking we bent over further than necessary?

[fol. 316] A. Oh, yes, I think so. Any one not experienced in being in a mine will bend further than one that has experience.

Q. 12. Weren't you walking either in front of me or just behind me when I ran into that cross piece and had a shock, jar, rather?

A. I do not remember where you were.

Q. 13. I remember the blow.

A. When we went up in Ten Right, there is a place about one hundred feet long that had headers across, and if I am not mistaken, that's where it was.

Q. 14. They are well named, headers.

A. Cross collars.

Q. 15. That's a correct name so far as I am concerned. These man trips the men ride, they are ordinary common coal cars?

A. Yes.

Q. 16. And they are left out in the open at night?

A. Yes.

Q. 17. You have snow up in your country,—some, I take it?

A. Yes, sir, it snows up there.

Q. 18. If it snowed six inches tonight and the men went out in the morning to ride one of these man-trips in that mine, would they find these cars with six inches of snow in them?

A. I don't believe they would if the mine is running regular. If it was Monday morning, it might be, if the snow was there.

Q. 19. Are you operating night shifts?

A. We dump our coal at night. The tipple at No. 1 runs both day and night.

[fol. 317] Q. 20. You dump the coal at night?

A. Yes, sir, and the cars are in transit hauling coal, and it wouldn't be reasonable to say the cars would be full of snow. In the winter time, it is true, if the snow melted, you might have some dampness in there.

Q. 21. Do you send the cars up there with snow in them for the men to ride in that man-trip?

A. I don't remember ever seeing any.

Q. 22. How about water?

A. You might see some dampness occasionally.

Q. 23. How about water, several inches of it?

A. I don't remember ever seeing one in a man-trip.

Q. 24. You have never seen one with snow in it?

A. Yes, I have seen some with snow.

Q. 25. How much?

A. Naturally, if it snowed, there would be some that fell on it.

Q. 26. An inch of snow is not the most comfortable place in the world to sit, is it?

A. The miner in the man-trip has always had the privilege of getting a cap-piece or wedges to ride on.

Q. 27. He has the privilege of getting that to sit on instead of getting his pants wet?

A. That's true.

Q. 28. No effort is made to keep these man-trips clean, is there?

A. No effort made to keep them clean, no.

Q. 29. You take the car in the condition in which you find [fol. 318] it and bring it up and the man gets in and protects himself the best he can against water or snow if it is in the car?

A. It is a rare thing there is any water on the bench. Down in the low part you will occasionally see water down

there. However, these cars are built with holes to drain the water out, but occasionally, some fellow stops that hole up to make it hold water and you will see water in there, an inch or two.

Q. 30. Do all of them have holes in them?

A. I don't know.

Q. 31. Just some of them.

A. I wouldn't answer, I don't know.

Q. 32. You made some answer yesterday, it was to this effect, as I recall, that no duty was required of the employe until he reached the face of the seam or until he reached his usual working place in the mine, with the exception of the machine man, who had to oil up his machine where he found it. Am I correct about that? Did you make some such statement or a statement to that effect?

By Mr. Richardson: May I interrupt just a moment? We would like to make a motion to exclude the questions that were addressed to this witness in reference to the discomforts in the man-trip cars as being beyond the scope of his direct examination and immaterial to the issues involved in this case.

By the Court: Overruled.

Q. 33. Look back on your notes if you care to. You read it off your notes, as I recall.

A. I don't have that on my notes, I don't think.

Q. 34. Is that statement correct?

[fol. 319] A. A man traveling inside, coal loader or company man, riding a man-trip, does not have any work to do under the contract we have been operating under until he gets to the place where he starts work.

Q. 35. How about the machine man?

A. The machine man does some work, setting the bits and such as that. That is covered in his cutting rate; that's my understanding.

Q. 36. Take a machine man that uses a motor and moves his machine with a motor, is it not a fact that after he gets a light, his lamp, in the same way that everybody else gets it, that he has to go on the yard and find the motor that's been assigned to him and bring that motor to the sand-bin; is that correct?

A. Yes, he does that.

Q. 37. He also goes to the oil house and gets a two gallon can of oil, does he not?

A. Yes, sir.

Q. 38. He gets that oil from out of his locker; that's correct, isn't it?

A. That's true.

Q. 39. Where it has been placed by the man in charge of the oil house?

A. That's true.

Q. 40. He then goes to the supply house and gets his bits for his machine, coal cutting machine, doesn't he?

A. Yes.

Q. 41. About how many bits does he get?

[fol. 320] A. That varies, depending on how much cutting he has and the conditions.

Q. 42. I understand that, but it runs between what figures?

A. They generally carry around about fifty.

Q. 43. These fifty bits will weigh how much a piece?

A. The fifty bits, fifty or sixty pounds.

Q. 44. About a pound a piece, about fifty pounds.

A. In the container.

Q. 45. What kind of container does he put them in?

A. He generally has a round box or round cylinder with a lid on top.

Q. 47. Is that supplied by the company?

A. Yes, sir.

Q. 48. He takes the fifty pounds of bits and the two gallon oil can and puts them on his motor, doesn't he?

A. Yes.

Q. 49. If his motor down in the yard is behind some other motors, he may have to shift any where from one to a dozen motors out to get his motor out in the clear?

A. What they do there, one man will take a motor and haul several machine men with him and they will go over all together. They do that for their own convenience.

Q. 50. Haul them where?

A. Over to the working section.

Q. 51. I am talking about a man who is getting his own motor. If his motor is in behind several other motors, he has to move those other motors out on the side track to give him clearance to get his motor out to go to the sand-bin?

[fol. 321] A. If he is taking a certain motor, he would.

Q. 52. Aren't they generally assigned the same motor?

A. The attempt is to give him a motor he is familiar with.

Q. 53. I am assuming that. He has to move these motors out in front if they are in front, between him and the sand-bin?

A. Yes, if they are in there.

Q. 54. And it would be unusual if he found his motor just the first motor, wouldn't it, be a plumb accident?

A. The way they generally do, they catch these motors as they come out of the mine, they get it right at the drift mouth, at the sand house. I have reference to No. 1 Mine now.

Q. 55. Is that usually true or an accident?

A. It's up to the man who is going to run the motor. If he is not there, probably he will have to do some shifting.

Q. 56. If he gets it when it comes out, he will have to be there?

A. Yes, he will have to be there. Some of them go in early for their convenience.

Q. 57. He has no way of knowing exactly what time it will come out of the mine?

A. He has approximately when the man-trip will run.

Q. 58. You certainly don't expect him to stand there and see when the man-trip is coming out, do you?

A. They have a few minutes range.

Q. 59. I am assuming that he comes out and finds his motor down the track with half a dozen other motors in front of him, he has to move that half dozen to get to the sand-bin, doesn't he?

[fol. 322] A. Yes, that's true.

Q. 60. He brings it to the sand-box and puts the sand in?

A. Yes.

Q. 61. How many places does he put sand in?

A. Four.

Q. 62. If they are empty, how much sand will it take?

A. Depending on the size of the box. It will take about three buckets. It should have some sand in it.

Q. 63. How much, if it is empty? I realize usually there will be some sand in it. Does each box hold about half a bushel of sand?

A. No, not hardly.

Q. 64. Three gallons?

A. Something like that.

Q. 65. If all four were empty, which I concede will seldom be the case, that will be twelve buckets of sand. Does he oil that motor?

A. He is supposed to put oil on it.

Q. 66. He takes oil out of the two gallon can and puts oil on the motor, in the oil cups, greases the motor up?

A. Generally greases the four journals.

Q. 67. Then he gets on it,—he has a helper, doesn't he?

A. Yes.

Q. 68. Then he and his helper get on it and come on up to the portal, approaches the portal, preparatory to going in. That is routine, isn't it?

A. Yes.

Q. 69. Who is it gives him the signal that gives him au- [fol. 323] thority to go back to his section?

A. He calls the dispatcher and asks the dispatcher for a right of way to a certain point.

Q. 70. If he is going to Parallel, he says: "Mister Dispatcher, I want to go to Parallel," and the dispatcher gives him directions, may send him a part of the way and hold him and then send him the rest of the way after clearance?

A. That's true.

Q. 71. He leaves his cutting machine up in his section or close to his section?

A. Yes, sir.

Q. 72. And goes up with his motor, if it is over in Parallel, he goes about twenty-three or twenty-four thousand feet, about four miles and a half, doesn't he?

A. Something near that.

Q. 73. Over there where he finds his cutting machine, when he gets to the cutting machine, he has to do what?

A. He gets his machine out and prepares for work.

Q. 74. He prepares his machine for cutting and then he hooks his motor on that machine and takes it up where he starts cutting, doesn't he?

A. Yes.

Q. 75. Tell me when his pay starts under your contract?

A. His pay is similar to a coal loader's pay, the way I look at it. These things are all included in the cutting rate.

Q. 76. Did you make the cutting rate?

A. No.

Q. 77. Have you ever sat in a conference that made the [fol. 324] cutting rate?

A. No. I said that was my understanding.

Q. 78. Have you ever sat in any wage conference?

A. No.

Q. 79. So you actually don't know what the rate includes, do you?

A. No, I have never been in a conference.

Q. 80. You are familiar with the rules of your company?

A. Yes.

Q. 81. Here are the rules for "Machine Men and Helpers." Show me in those rules where there is anything that requires that machine man to get his motor, to get his oil, to get his bits, on the outside, to bring his motor up, load on the bits and load on the oil, sand it, oil his motor, and go that distance of my illustration of four and a half miles to his machine. Show me that.

A. It has been customary for a man to do that with a mining machine as long as I have worked in a coal mine.

Q. 82. But you don't see anything in those rules requiring him to do that, do you?

A. I don't know.

Q. 83. Look and see.—You don't see anything in there that requires him to do all that, do you?

A. No, I do not. I haven't read it all yet.

Q. 84. Excuse me.

A. It says the machine runner is responsible at all times for the safety of the helper and it shall be the duty of the machine runner to see that his machine is in good repair, [fol. 325] *in good repair* and well lubricated.

Q. 85. That means the machine that does the cutting?

A. Yes.

Q. 86. But I am talking about his motor that he has been working with on the outside. The only thing in those rules in regard to his duties is in relation to that cutting machine, isn't it?

A. Yes, I take it that is the way those rules are to be interpreted.

Q. 87. Why is that motor brought out?

A. That motor doesn't have to be brought out, and often times the machine man will get that motor over on his section, ride a trip of cars through the mountain.

Q. 88. Is that very frequently done?

A. It has been. I wouldn't say it is done frequently.

Q. 89. That's unusual, isn't it?

A. No, they do it right along.

Q. 90. The customary procedure is the one I have outlined?

A. Some of them are. Frequently, they ride through.

Q. 91. You stated yesterday, as I recall, and stated today that a machine man began to perform duties when he reached his machine. What do you call getting the motor outside, going to the sand-bin and getting the sand, getting the fifty pounds of bits, sanding it, oiling it and traveling four and a half miles? What do you designate that?

A. My opinion—my experience has taught me that that has been customary and that the cutting rate takes care of that time.

[fol. 326] Q. 92. You don't know anything about the cutting rate, do you?

A. I told you that was my understanding.

Q. 93. As a matter of fact, some of the men don't do that, do they?

A. Don't do which?

Q. 94. The things I have described. Some of them use a pony truck?

A. Yes, and the reason they use a locomotive, the grades are right steep and it is not safe to use a pony truck.

Q. 95. How far do they have to carry these fifty pounds of bits, after they get them, to the place where they put them on the truck?

A. The man who goes to work on a cutting machine goes to work on an off-shift when nobody is on there, and they ride as far as they can. They are meeting the traffic coming out, the man-trips, and some times they carry those as far as—well, I don't know what point.

Q. 96. Two hundred feet any way?

A. Some of them carry them more than two hundred feet.

Q. 97. Carrying fifty pounds two hundred feet, don't you consider that work?

A. It is not productive work.

Q. 98. Not productive to him, he doesn't get paid for it?

A. He is not producing any coal.

Q. 99. He is getting ready to produce coal, isn't he?

A. Yes.

Q. 100. You have got some men on the cutting machine [fol. 327] that you pay by the hour, haven't you?

A. Yes.

Q. 101. Their time starts when?

A. Those fellows, the ones over at No. 1 Mine, that's the ones you are talking about, we have three crews over there, I believe, two that cuts in Bear Wallow and one that cuts in No. 4 Mine, and the one that cuts in No. 4 Mine work- by the shift and have five or six hours work to do.

Q. 102. Their time starts when?

A. Whenever they—the way we have there, we have an arrangement with those fellows, they quit when they get through cutting.

Q. 103. They start their shift when they start cutting coal?

A. No, those fellows, after the day shift is over, those machine men come down and get a motor and ride over to where their machine is and start cutting, and when they get through, they stop, and they get a shift for it.

Q. 104. Do you start counting their time when they start work cutting that coal?

A. Yes. They get paid by the ton, and don't get paid until the first ton is cut.

Q. 105. I am talking about the hour men. Do you start counting their first hour when they do their first work cutting coal?

A. Yes, sir.

Q. 106. And those men also have to do the other work I have described?

A. Yes, just like a motorman.

Q. 107. And you start counting his hours when he starts [fol. 328] cutting coal, don't you, regardless of when he quits?

A. When he quits, he gets paid for what time he works.

Q. 108. These man-trips, you said that they were for the convenience of the men in the mines, as I understood you to say?

A. They are run for convenience, both to the Company and the men.

Q. 109. Do you know of any mine that's comparable to the Jewell Ridge Mine where they do not have man-trips but let the men walk in three or four or five miles?

A. Not at the present time.

Q. 110. How long since you have known men walking five miles in a mine to get to work?

A. I haven't known men to walk five miles in my experience but I have known them to walk two miles back several years ago.

Q. 111. Did you say anything in your evidence on yesterday about the man-trips being for the convenience of the company? Didn't you say they were for the convenience of the men?

A. I don't believe I said anything about it being for the convenience of the company. They are for the convenience of the company.

Q. 112. You put it for the convenience of the men on yesterday?

A. Yes, sir.

Q. 113. But they are also for the convenience of the company?

A. Yes, sir, in my opinion.

Q. 114. Do you think these miners would work in that [fol. 329] mine if you didn't have man-trips?

A. They would work where the coal was probably more easily mined.

Q. 115. And where there were man-trips. If you posted a notice tomorrow morning to this effect: Hereafter there shall be no man-trips in the Jewell Ridge Mines—Employes going in the mine may walk or get there the best way they can,—how long do you think your mine would be operating?

A. Well, personally, I imagine the fellows would go where they could get to their work the easiest and make the greatest wages.

Q. 116. Do you think that would be at Jewell Ridge?

A. No. I think a man-trip is for the benefit of the company the same as it is for the men, so far as the man-trip is concerned.

Q. 117. I wanted to be certain of that because I didn't recall your making such a statement on yesterday.—Mr. Hagy, I notice that in Parallel Fourteen East, and that is, by the way, where the lawyers went, our group, at least, that it is 25,460 feet from the portal. How long would it take a man to walk that distance, going to work?

A. It would take a fellow, I don't know, you would have to guess at it, a fellow walking that far, you might compare it with a fellow walking outside and then include your extra labor that it might take, extra energy it might take to walk a track such as that. I would say it would take considerable time to walk that distance.

Q. 118. Give me an idea how long it would take to walk [fol. 330] that distance?

A. It would take over an hour.

Q. 119. How long does it take you to run it with a man-trip?

A. You have some figures on that.

Q. 120. Would you mind turning to them, Parallel Fourteen East.

A. It takes forty-six minutes to the Parallel man-station with a locomotive with a man-trip.

Q. 121. One way?

A. One way. That's stopping and letting men off and on.

Q. 122. That's by power on track?

A. By power on track.

Q. 123. How long do you think it would take for a man to walk that? You guessed that it would take something like an hour.

A. It would take him over an hour.

Q. 124. That man-trip is going to move twice as fast as a man could walk, isn't it?

A. I would say—I couldn't tell you how long it would take. I don't know.

Q. 125. I understand that but you have been working around mines all your life and have been in that mine time after time. Give me your best idea how long it would take a man to walk it, keeping in view it takes forty-six minutes to ride on the man-trip with an electric motor. He certainly won't walk any more than one-half as fast as that man-trips runs, will he?

A. No, it will take him right much over an hour to walk it. It would take him somewhat longer, I assume, than it would outside.

Q. 126. If he went one-half as fast as it runs, it would [fol. 331] take him an hour and a half each way?

A. That's what I mean.

Q. 127. And he would have to do some powerful walking to walk one-half as fast. What would he do if he was carrying tools?

A. I haven't seen any one carrying tools. I don't know what he would do.

Q. 128. Let me see—maybe I don't understand you,—are you contending that the company has no interest as to how these men get there?

A. Yes, they are. They are very much interested in how a man gets there. If a man has to walk there, he isn't

worth anything when he gets there. The idea is to get him there able to work.

Q. 129. You don't want him to get there tired?

A. No. That's to the company's advantage, the way I feel about it.

Q. 130. So, really these man-trips are run by the company so they can get the men to the working places in shape to work; isn't that true?

A. That's true.

Q. 131. And they have been running man-trips over there for many years, haven't they?

A. I don't know. They were running man-trips when I came there.

Q. 132. As a matter of fact, if a man comes up now and misses a man-trip, gets there late, you see that he gets in there, don't you?

A. I see that he gets there.

[fol. 132] Q. 133. If a man comes up and says "Mr. Hagy, I have missed my man-trip," you don't say "Start out walking"?

A. No.

Q. 134. You put him on something to carry him?

A. I do, to get him to the working place.

Q. 135. How about along the side of the track? It's pretty rough, isn't it?

A. In some sections of the mine, it is rough. Others have been cleaned up, the section where you gentlemen were on, all that section over in there is cleaned up, what I consider in really good shape. On the main line, however, coming back, there is lots of gob and crushed along that falls off the cars and there are places that doesn't have clearance but that was going through those roads and things like that. It is true that some don't have clearance but in all our development work, we try to maintain clearance.

Q. 136 If you had no man-trips and started two or three or four hundred men walking in that mine, it would be a pretty dangerous situation, would it not?

A. It would if you were hauling coal, because you don't know which way the men are going.

Q. 137. If it took an hour and a half, it would mean during that travel time you couldn't move any cars, wouldn't it?

A. No, not on the main line where the main haulage is.

Q. 138. So, as a practical proposition, you couldn't operate that mine unless you had man-trips, could you?

A. Well, I wouldn't want to say that you couldn't. We have a lot of openings where men can get in but it wouldn't [fol. 333] be practical to try to operate the mine, I don't think, having to walk from the driftmouth in. We don't tell a man he has to ride a man-trip but we like for him to ride it and want him to ride it.

Q. 139. And you expect him to ride it?

A. If he does any good, he has to ride it.

Q. 140. If he performs any reasonable work, he has to ride it, hasn't he?

A. Yes, sir, I agree with you.

Q. 141. You made some statement yesterday or several times, as I recall it, on this map here, which I don't understand very well, about a lot of openings where men could just walk in, driffs, you call it?

A. Yes.

Q. 142. In Mine No. 1 you pointed out probably—I will say several, maybe a half dozen or more places, where you could walk in?

A. Yes.

Q. 143. You did that, didn't you?

A. Yes.

Q. 144. In one place you mentioned where two cars are customarily parked on the mountain and the men walk down?

A. Yes.

Q. 145. Does your company expect the men to use these drifts to walk in or to customarily use the main portal that we went in?

A. It's optional with the man, whichever he wishes to use.

Q. 146. The men who use these openings you described are men who live on the mountain side, pretty convenient to these openings?

[fol. 334] A. Yes.

Q. 147. You have got one hundred and seventy-one houses at No. 1. Certainly it wouldn't be pratical for any of those men to use any entrance except the main portal, would it?

A. The houses were built, I think, as nearly and as closely to the driftmouth as was permitted from the lay of the land there.

Q. 148. Do you mean the main entrance?

A. The lamp house, the main entrance. When the camp was built, the mine was young. The camp was built when it wasn't very far inside from that No. 1 portal.

Q. 149. Do you expect any of these men who live in the one hundred and seventy-one houses to enter the mine any way except through that main drift?

A. If we were to open another drift and prepare a way for a man to get there, I would think that it would be—that a man would prefer—any way, he would prefer getting to his work the easiest way.

Q. 150. Any way, you haven't done it yet?

A. No.

Q. 151. And these men that you haul in, that you pay their fare to come to work, these vehicles that they ride in, that you pay the fare for, put them off at the main portal, don't they?

A. Yes, some do,—No, I believe they all do.

Q. 152. And that's true down at No. 2, isn't it?

A. Yes.

Q. 153. The men whose transportation your company pays get off at the main portal at both mines?

[fol. 335] A. Yes, as near as they can get.

Q. 154. Are there any sanitation facilities of any kind in that mine?

A. The sanitation facilities are about the same as in all coal mines.

Q. 155. You have space from the time you enter, you have ground there, but you have no sanitation facilities in there whereby men go to meet the calls of nature?

A. All mines are just alike. This is just like all of them.

Q. 156. And all of them are about like the great open forest?

A. They go out where no one is working in an old breakthrough some where.

Q. 157. You mean they are supposed to?

A. If he has any cleanliness or any feeling that he should do that and get away from everybody, he should. That would be up to the man himself.

Q. 158. Do you have gnats and things like that flying around in the mine?

A. Occasionally.

Q. 159. In some sections, you have plenty of them, don't you?

A. Gnats go in there in the fall. We have lots of them when it commences getting cold outside.

Q. 160. How about in the summer time?

A. You have them in the summer time.

Q. 161. You have them all the year around?

A. Occasionally you find a place that has gnats in it.

Q. 162. And when the men eat they have to eat fighting off [fol. 336] gnats, don't they?

A. No, I don't think that.

Q. 163. Is that true in any section of that mine?

A. No, I don't think it is. There might be some sections, but you find gnats in any coal mine I ever worked in.

Q. 164. You described that lamp there. The miner pays rent for that lamp?

A. Yes, he pays rent.

Q. 165. He pays eight cents a day?

A. Yes. He doesn't right now.

Q. 166. He did until the War Labor Board relieved him of it?

A. That's true.

Q. 167. And that hasn't been so many weeks ago?

A. When he used carbide, he furnished his carbide and when they changed to electric lamps, the lamps were all leased.

Q. 168. Leased from who?

A. The manufacturer to the Jewell Ridge and Jewell Ridge charged the coal loader or inside man eight cents a day for the use of that light.

Q. 169. Do they charge the company men eight cents a day, too?

A. Everybody is charged the same.

Q. 170. Everybody who gets a light pays the same for it?

A. Yes, or did.

Q. 171. Until the War Labor Board made the ruling on it?

A. Yes.

Q. 172. The Cardox you mentioned, that's a long pipe kind of an arrangement with some kind of gas, that, with [fol. 337] an electric spark, it explodes?

A. Yes, the heat expands and shears a little disk and lets the gas out and shoots the coal.

Q. 173. I believe it takes an augur, which I tried to use and couldn't, that bores the holes in the coal, bores three?

A. Bores two, ordinarily.

Q. 174. How much does he pay for that Cardox?

A. Forty-two and a half cents.

Q. 175. A piece?

A. Yes.

Q. 176. So, if he shot off two holes, he would pay eighty-five cents for shooting that coal down?

A. Yes, that's what he would pay for the two Cardox.

Q. 177. Are those man-trips dangerous?

A. I don't think they are very dangerous. They haven't proved that way with us.

Q. 178. Has anybody got hurt on them?

A. Since I have been there, I recall about three.

Q. 179. You have been there something over a year, I believe?

A. It will be two years in February.

Q. 180. This coming February?

A. Yes, sir.

Q. 181. And three men have been hurt on man-trips in that time?

A. Three that I can remember of.

Q. 182. How were those men hurt?

A. If I remember right, the cars were going around a curve and he was sitting in a car and had his arm out like [fol. 338] this, and the car on the other side—let me show you, it was something like this, the cars were coming like this and the cars were coming around a curve and he held his arm over and mashed it between the corner of that car and the corner of this car. That's one, the most severe. The other two I don't remember. One had a rib broken, and I don't remember what happened to the other fellow.

Q. 183. Do you remember when that electric trolley broke and scared some men out of their wits and injured them a little?

A. I remember that. I didn't see it. I remember when it happened.

Q. 184. I didn't mean, Mr. Hagy,—my question was not the men you had seen get hurt but the men you knew of getting hurt on man-trips, whether you saw them or not. You heard about that wire breaking over there?

A. Yes. I remember about the wire.

Q. 185. One man got his neck burned and still has a scar on it?

A. I don't know.

Q. 186. Was that before you got there?

A. I don't know who was hurt. The only thing I am going by is the reports.

Q. 187. Did that take place since you got there?

A. Yes, but I don't know who was hurt.

Q. 188. That was at Jewell Valley?

A. That was at Jewell Ridge. The wire fell in the car, fell on the corners of the car.

Q. 189. And burned some men, didn't it?

A. I don't remember.

[fol. 339] Q. 190. Don't you remember that anybody was hurt at all?

A. No, I do not remember. I heard some talk of it, and some fellow mashed his ribs, but I don't remember who the man was.

Q. 191. You didn't include that?

A. I did not include that. It was not reported as an accident and I don't know how bad it was and don't know how serious it was or who it was.

Q. 192. Are you sure it wasn't reported as an accident?

A. I don't remember it being reported.

Q. 193. You really don't recall?

A. No, I don't recall.

Q. 194. Have you had any such similar experience at Jewell Valley on the man-trip with the wire breaking?

A. No, I don't remember.

Q. 195. How long does it take a man to get his lamp? I think I misunderstood what you said.

A. To get his lamp?

A. Yes.

A. After he gets to the window, it doesn't take but a second or so.

Q. 196. Getting to the window is the point I am interested in?

A. If the men get there kind of scattered out, no one hardly ever has to wait in line, but if all these busses that we haul these men in come in there, some times they have to wait five or ten minutes before the whole line passes.

Q. 197. After they get their lamp, if they have tools, they go to the blacksmith shop and get the tools?

[fol. 340] A. Yes, they go to the blacksmith shop and get the tools and put them in the tool-car. They look after their own tools?

Q. 198. They have to pay for having their tools sharpened?

A. They did. They do not now.

Q. 199. The reason they don't is because the War Labor Board relieved them of that?

A. That's what I understand.

Q. 200. Prior to that, they paid one-half of one per cent for the blacksmithing?

A. I don't remember that that is the exact figure. It was a small sum.

Q. 201. One-half of one per cent if a man is making two hundred dollars a month costs him $1.00 a month?

A. Yes.

Q. 202. If he has any tools, he gets them and puts them in the tool car?

A. Yes.

Q. 203. The reason you required his tools to be placed in the tool-car was because it would be a very dangerous thing to ride on a man-trip with tools in the same car with the men?

A. Absolutely, it wouldn't be considered safe.

Q. 204. Why would it be dangerous?

A. Several things might occur. A fellow start to get out and hit his leg against an augur or catch his leg, cut it, or hit his arm in some movement. It might be a slate fall or something like that might happen. That occurs sometimes and the trip might want to stop suddenly.

Q. 205. A slate fall in the cars?

[fol. 341] A. No, ahead of him or something like that, or maybe somebody flag the trip or he might stop sudden and the man hit his leg against a pick or something like that, trying to move to see what happened.

Q. 206. If that slate might fall in front of the car, it might fall in the car, too, mightn't it? You can't tell when slate is going to fall, can you?

A. No, you can never tell. That's possible for it to fall in the car. I never had it happen in my experience.

Q. 207. You have heard of that, haven't you?

A. I have heard of one accident like that.

Q. 208. When you ride in that mine, Jewell Ridge, particularly, at various points somebody has marked "DANGER," or some word that indicates danger,—you have to look after that roof up there?

A. Yes, you have to look after the roof.

Q. 209. And also at various places, the roof is marked, calling attention to this particular rock?

A. Calling attention so when the mine foreman goes along, he examines it. If he thinks it should come down, he takes it down. You don't take all loose rock down but lots of times it is marked to call the attention of the foreman so he can keep a close watch on it.

Q. 210. The way the man-trips would run at Jewell Ridge, —I understand it is different at Jewell Valley,—you usually had two going in?

A. We had two long trips going over to the farthest side of the mine and these cars would be cut off, going to various sections, and picked up by the gathering motor.

[fol. 342 Q. 211. The last four cars, say, that you put the men in, those cars should go off at the closest or the first place, shouldn't they?

A. Yes.

Q. 212. So as to keep them all together?

A. Yes.

Q. 213. When that man-trip reached the particular section where the men in the last four cars were working, you cut it off and go ahead and maybe the next four cars you would cut off for the next section and cut the tool car off also?

A. Yes, sir.

Q. 214. So the train was divided up into cars going to certain sections and a tool car going to certain sections?

A. That's right, so many cars, enough to haul the men.

Q. 215. And the men would get in the cars according to the sections so as to stay in when it was shifted off?

A. Each man knows, just like when you get on a train, he knows which car to get on.

Q. 216. With the cars for each section, there is a section foreman who rides in those cars, isn't there?

A. Just about a section foreman for each section that goes to a certain portion of the mine.

Q. 217. Does the section foreman ride in the cars with his men?

A. Yes, that's the custom.

Q. 218. I believe you had the rule over there that no more than seven men should ride in a car?

A. I don't remember the rule. I don't think we have any [fol. 343] printed rule on it. I don't remember ever seeing

it, don't remember having any printed rule on it, but we have tried to hold it down so there wouldn't be too many men in a car.

Q. 219. The men generally understand it is seven men to a car?

A. I don't know. I believe some of them over at No. 2 talked about eight. So far as I know, we don't have any rule.

Q. 220. If too many men get in one car, the section foreman in charge of that car will tell them to get out, won't he?

A. For safety reasons, he does.

Q. 221. He does tell them to scatter out and get in different cars?

A. For safety reasons, he does.

Q. 222. If the men indulge in horseplay, then the section foreman in charge of those men make them desist?

A. It is rare that you ever have it. If he did, I would say he would. He would advise them if they didn't quit horseplaying, a fellow might get hurt, might step where he shouldn't, might fall down,—as a safety measure.

Q. 223. And the section foreman might give him a discipline slip?

A. He might. I don't remember one ever being given.

Q. 224. Certainly one would be authorized?

A. Yes, it's in the rule book.

Q. 225. If one of the men got on the train while it was moving or got off while it was moving, he would be disciplined by his foreman, wouldn't he?

A. Yes, that would be a dangerous practice.

[fol. 344] Q. 226. He might be given a discipline slip for that?

A. He would be given a discipline slip if he was doing something that would be considered dangerous, where he might hurt himself.

Q. 227. Do the section foremen ever give any instructions to the men about the day's work while riding on that man-trip?

A. Not necessarily. The- tell a man any time, may tell him at home or in the evening, something he might do when he gets to his working place.

Q. 228. And he might tell him about it on the man-trip?

A. Yes, he might tell him any where. I often see a man on the hill and I tell him something to do when he gets to his working place.

Q. 229. But the section foremen do give the men orders while riding the man-trip in regard to their work?

A. They can't give a man many orders about a working place until they get in the place. Practically all the orders given to a coal loader are given in the working place. A section foreman doesn't know the condition of the place until he gets into the different places. It is different than it was the night before. It has a fresh cut and the condition of the place has changed from the condition it was the day before. That's where most of the orders are given.

Q. 230. But some of them are given on the man-trips, aren't they?

A. If a fellow comes up and asks for advice, what must I do, the section foreman will tell him.

Q. 231. And if he is sitting in a man-trip, riding in a man-
[fol. 345] trip, doesn't the section foreman give instructions as to his duties while making that trip?

A. Yes, he gives him instructions what to do when he starts work. Occasionally, he gives somebody orders. I have ridden a man-trip and some times you see him talking to somebody, but that's rare. He doesn't talk much to the men in riding on the trip.

Q. 232. That's because of the noise of the trip?

A. Well, ——

Q. 233. How fast do these man-trips run?

A. If you time them they are not going as fast as you think they are by riding in them. Figure it yourself. That longest time is forty-six minutes and that trip stops four or five times in the distance to let me off. If you run a locomotive too fast, it throws the coils. A motor won't run very fast unless you let it drift down hill. A lot of these motormen hauling man-trips right now don't make over six miles an hour.

Q. 234. How fast would you say the trip was going that we were riding in?

A. About seven. The speed of that motor is eight, going up hill.

Q. 235. It can go faster down hill?

A. Oh, it will drift, but they are not going as fast as a fellow inexperienced,—they won't go as fast to a man experienced seemingly as to a man not experienced.

Q. 236. I imagine that's true. You mentioned something about having a man-trip station inside the mine at No. 1, for instance. That's very close to where the magazine is for each section?

[fol. 346] A. Some where fairly close.

Q. 237. Now, the man, the miner or employe, in some sections, puts up a disk with his number on it, and in other sections, doesn't, depending on the section foreman?

A. Yes, depending on the section foreman.

Q. 238. After he gets his powder and detonators at No. 1, he sets out walking to his room?

A. To his working place.

Q. 239. And they have to walk as high as fifteen hundred feet, don't they?

A. Yes.

Q. 240. In walking that fifteen hundred feet——

A. That's about the maximum, fifteen hundred feet.

Q. 241. In Parallel, assume that he was working where I said a few minutes ago, if I can get it back, Parallel Fourteen East, when he leaves the man-station for Parallel Fourteen East, how high is the roof back to where he would be working?

A. In that particular section, all along the entry, you have fairly high roof.

Q. 242. How high? What do you mean?

A. It runs around three to four feet of draw rock above the coal.

Q. 243. Are you talking about the main entry?

A. Yes.

Q. 244. After he leaves the main entry and starts in to the room, how high is it?

A. The coal is something like forty-six to fifty inches high and we try to timber and hold the draw rock and if we don't, it comes up maybe a foot or two of draw rock.

[fol. 347] Q. 245. That timber itself is how thick?

A. Three or four inches.

Q. 246. What is the maximum height in that section, walking from the man-station to where he is working, in that section?

A. He would have fairly good height up to the mouth of his room. His room can't be over three hundred feet long.

Q. 247. Fairly good height doesn't mean anything to me. Give it to me in inches?

A. It would be from sixty to sixty-five inches on up where the draw rock has come. Most of that entry you refer to it run about four feet of draw rock that was taken but the rooms driven off of it, of course, we don't take it.

Q. 248. How high are those rooms?

A. They run around forty-six to forty-eight inches, ordinarily.

Q. 249. That means a man walking there has to walk with his back or whatever part of his anatomy is the highest not over forty-six inches high?

A. Something like that, forty-six to forty-eight.

Q. 250. If he is a six foot man, he has to get two feet of his anatomy down lower than natural. How far do they have to walk in that position?

A. The maximum length of the room is three hundred feet; varies from nothing to three hundred.

Q. 251. You said you took us over to Parallel. That's one of the highest roofs in the mine. What's one of the lowest?

A. Number One, I imagine it would be around, down in No. 1, the lowest portion of the mine doesn't have much tim-
[fol. 348] ber; you generally have draw rock and the coal runs around forty-six inches with the draw rock over it.

Q. 252. How far does a man have to walk down there and keep below forty-six inches?

A. Some of those cross-entries, a few places down there where the entries are long, he would have to walk about eight hundred and fifty feet, maximum.

Q. 253. The maximum would be about eight hundred and fifty feet, in a space not more than forty-six inches high?

A. Yes.

Q. 254. That's Jewell Ridge. Down at Jewell Valley, what's the situation there?

A. At Jewell Valley, the Federal Mine Inspector's report was forty-four inches. Our engineers run some where around between forty and forty-two inches.

Q. 255. Give us the lowest section?

A. The lowest section would be around about thirty-six inches. However, there are a lot of rolls in the roof. One of them mght come down even lower than that but it would be only a distance of twenty-five feet maybe.

Q. 256. How low could it come down?

A. It can't come any lower than twenty-eight inches. On most of those sections, the mining machine runs around

thirty-five inches above the rail where they use standard machines and it can't be any lower than that, but we do have one section that will come down to thirty-six inches.

Q. 257. That means the man is walking there in a space not [fol. 349] more than thirty-six inches high?

A. There is one thing about low coal, when a man learns to walk in that low coal, he walks with his hands as much as his feet. I can walk all right in there.

Q. 258. You mean he gets down on all fours?

A. No, I get a stick or cap-board and I can get along about as fast as in higher coal.

Q. 259. You have to be accustomed to it, though.

A. Yes, sir, to do it.

Q. 260. Did you see me scrambling around over there?

A. Yes.

Q. 261. I wasn't accustomed to it?

A. No.

Q. 262. How would a man carry his tools, under such conditions?

A. The motorman always hauls the tools in a low seam like that, unless he wants to go to get a hammer or something like that, but if he wants to have a full set of tools, he will have a tool car.

Q. 263. How about his dinner-bucket and suppose he took a pick out to be sharpened and took it back the next day?

A. A lot of times they leave it in the car and a lot of times, rather than wait for the car to bring it to him, he will carry it. A pick is a little dangerous, but it serves also as a walking stick.

Q. 264. It's not a very desirable walking stick, though?

A. No.

Q. 265. Over there, you say you have one low motor?

[fol. 350] A. No, I was talking about a low vein machine.

Q. 266. A cutting machine?

A. Yes.

Q. 267. Are all the motors you have there the same height?

A. Yes.

Q. 268. Don't you have one motor you put a steel top on or metal top?

A. No, you are talking about No. 1. At No. 2, the motors are the same height, the haulage motors thirty-six inches high and the gathering motors twenty-eight.

Q. 269. How do you get a motor into this real low place?

A. We have to take the roof — if it comes down under twenty-eight inches.

Q. 270. But down to twenty-eight inches, you can get the motor under it?

A. Yes.

Q. 271. You have had to put some special top on to get the motor under, haven't you?

A. No, not at No. 2. At No. 1, we put a top on over there, and also one motor come- there that was real high and they cut it down and made a ten ton motor out of it. That's that forty-six inch section down there. Of course, there is other places still higher than that.

Q. 272. A man going out, after he has finished his day's work in No. 1, he comes back to his man-station for his section?

A. After he quits work, leaves the working place, he comes down to the man-trip station.

Q. 273. Turns in his powder, if he has any left?

[fol. 351] A. Yes, if he has any left, he turns in his powder.

Q. 274. In the morning when he comes in, he gets his powder at that station before going to his room?

A. Yes, sir.

Q. 275. Powder and detonators?

A. Yes.

Q. 276. When he comes back in the evening, if he has any powder left, he brings his powder and detonators back?

A. Yes.

Q. 277. And checks in any powder or detonators he has left there?

A. Yes, sir.

Q. 278. Now, he leaves an order for the number he needs the next day?

A. He does.

Q. 279. He waits there for a man-trip at his station?

A. That's true.

Q. 280. And you get those men in much faster than you get them out, don't you, or did?

A. Well, there were times when they were late, a minute or two, as I mentioned before, when some men was a little late, wanted to finish a car or something, they never ran

off and left him. Now, of course, they are supposed to run them on time.

Q. 281. Didn't you, prior to November 3rd when the men came back on duty, didn't you give priority to load trips with coal coming out, didn't you give priority to the coal cars?

A. No, I did not.

Q. 282. Didn't you hold those men on side tracks, so to [fol. 352] speak, until the coal came out?

A. There was a mix-up one day. I was not in the mine——,

Q. 283. I understand anything can happen once. I am talking about the general policy.

A. No, that isn't the general policy at all. Unless somebody made an error or something like that, it didn't happen. I know one day, some one might have mentioned it to you, the dispatcher had to go home and put a new dispatcher in and he let some cars come over when he already had some cars on a side track, but so far as giving priority, there wasn't any such thing done unless it was a mishap or something.

Q. 284. Were you not more interested in getting the coal out than you were in getting the men out when the day's work was done?

A. No, I was more interested in getting the men out and I made an effort to do that. I wanted them out and I never gave an order at any time to sidetrack a man-trip for a load of coal.

Q. 285. You never gave an order but was it customarily done?

A. No, I don't think so, unless somebody got mixed up. I don't think it was done on purpose because I made an effort to try to get the men out on time. I don't believe in holding them in there.

Q. 286. Since the contract of November 1st, between Mr. Ickes and Mr. Lewis, you have been getting your men out of the mines much quicker, haven't you?

A. We had to change the layout altogether and what we did was to change all our coal hauling and everything like that.

Q. 287. My question was since the contract between Mr. Ickes and Mr. Lewis of November 3rd, you have been [fol. 353] getting the men out of the mines quicker than you did before?

A. We don't wait on any one now. If somebody misses a trip——

By Senator Muse: Read the question, will you?

Question No. 287, as reported, was thereupon read.

A. Yes, we have been getting them out. If a man isn't there when quitting time comes, the man-trip runs, and we make provisions to get that man out that misses the trip. The section foreman will stay until he gets that man. We changed our haulage system.

Q. 288. Don't you get them out quicker primarily because you are running a man-trip with gathering motors from each section?

A. It takes as long to run the man-trip, so far as time is concerned, but we have less interference by changing the main line haulage. When a man starts out of there now, he doesn't have anything to block him.

Q. 289. Why?

A. We changed the main line haulage.

Q. 290. You have gotten the coal cars out of the way?

A. We start at the tipple and dump all we had left over from the day before. That's the reason we are not going to have any snow left in them.

Q. 291. You said there was less stoppage. What did you stop for?

A. When we were hauling the longer trips, the motor would have to stop and pick up a car from this section and another from that section. Now they all come out together, [fol. 354] which I don't believe is as safe.

Q. 292. Now, instead of switching and getting all the cars together in one or two long man-trips, you use gathering motors and have a man-trip for each section?

A. Yes.

Q. 293. And you are getting the men out much faster?

A. No, not faster, but they get them out sooner because they don't have the delay.

Q. 294. Maybe "faster" is not the correct word. You get them out much sooner?

A. Yes.

Q. 295. You get them in sooner?

A. Yes. Those far away don't get as much time at the working place.

Q. 296. I didn't understand you.

A. The ones that ride a long distance from the drift don't get very much time at the working place. They are cut short. They don't hardly have seven hours right now.

Q. 297. Don't you take them in sooner? Take parallel,—that's the one I am claiming kinship with,—take a man working in Parallel section, the way you are working now, you send a man-trip to Parallel section?

A. Yes.

Q. 298. That trip has an open road, doesn't it?

A. Yes, he has an open road.

Q. 299. He gets to the parallel section quicker and sooner than he would if he was on the old man-trip?

A. I wouldn't say that, because formerly, if he didn't [fol. 355] have anything to hold him up, he got there as quickly as he does now.

Q. 300. Formerly you had to stop and cut those five cars off?

A. That was the delay, that was the only delay they had.

Q. 301. Would you mind—then you go to another section and cut off some more and you did that several times, and that caused a delay, didn't it?

A. Yes, a minute or two, a delay each time he made a shift.

Q. 302. Now you don't have that delay. You fix the man-trip up and it goes to Parallel; isn't that true?

A. Yes, sir.

Q. 303. When the day is over, you reverse the process and out he comes from parallel. As a matter of fact, you have wrecks on that Main haulage now and then, don't you?

A. We had one one day.

Q. 304. You had one that I know something about?

A. Yes, sir.

Q. 305. How long did we sit there, Mr. Hagy?

A. About forty-five minutes. I don't remember exactly. That was due to a green man being on the locomotive that day and he had a mishap and let the motor run down and wreck some cars. That's part of mining. You have that in any kind of industry.

Q. 306. I understand that. I enjoyed it, sitting there.

(Witness stands aside.)

(At this point, it being 5:00 o'clock P. M., Court adjourned until tomorrow, Saturady, November 20th, 1943, at 9:30 o'cock A. M., at which time the trial of this case was resumed.)

[fol. 356] J. A. HAGY, a witness heretofore introduced on behalf of the plaintiff, being recalled, testified as follows:

Cross-examination.

By Senator Muse:

Q. 307. Mr. Hagy, the operation of Jewell Valley, which is spoken of as Mine No. 2, is similar and alike to the operation of No. 1, with minor exceptions; that's true, isn't it?

A. No, I wouldn't say that. The natural conditions are quite different. The seam of coal is different.

Q. 308. I recognize that, but you have the man-trips down there at No. 2?

A. Yes, the same as we have at No. 1.

Q. 309. And you have the machine cutters down there?

A. Yes, sir.

Q. 310. The operating conditions are somewhat different because of the different height of the coal seam?

A. That's true.

Q. 311. But otherwise, it is very similar to No. 1?

A. In many respects.

Q. 312. In most respects?

A. In most respects, I will say.

Q. 313. And such minor variations are because of the difference in the seam and somewhat different working conditions?

A. That's true.

Q. 314. But as an overall picture, it is very similar to No. 1?

A. Outside of the natural conditions, they are very similar.

Q. 315. The same type of work?

A. Yes, at each mine.

[fol. 357] Q. 316. I believe you said yesterday that the labor cost of producing coal at Jewell Ridge was approximately eighty per cent?

A. I did.

Q. 317. Do you know whether or not the average labor cost in the industry as a whole is sixty-five or approximately sixty-five per cent?

A. No, I do not. I do not have the figures on it.

Q. 318. Are you certain that your figures are correct of eighty per cent for Jewell Ridge?

A. Yes, approximately correct. I took the cost over about a four months period. The labor cost and the total cost in our office and it runs around eighty per cent.

Q. 319. For that four months period?

A. Yes.

Q. 320. Whether or not that four months period is a typical period or not, you don't know?

A. I took it for the last four months.

Q. 321. What it would have been for the four months preceding that, you don't know?

A. No.

Q. 322. And what for the preceding eight months, you don't know?

A. I took the figures for six months.

Q. 323. And the average cost for the industry, so far as you know, may be sixty-five per cent?

A. I do not know what it is.

Redirect examination.

By Mr. Richardson:

[fol. 358] Q. 1. Mr. Hagy, on cross-examination yesterday afternoon you were asked some questions about the machine men, I mean the men who operate cutting machines. Are those cutting machines self-propelled?

A. Yes, the cutting machines are self-propelled.

Q. 2. Ordinarily speaking, is a motor required for use in connection with a cutting machine?

A. No, a motor is not used. However, on the Parallel section, we have steep grades over there and we use motors over there with the machines to keep the machine from running away down the steep hill. The locomotive has better brakes than the machines do and we use a locomotive in that section of the mine, all the Parallel section, to keep the machines from running away.

Q. 3. The Parallel section is a portion of the No. 1 Mine?

A. That's true. It is a portion of the No. 1 Mine.

Q. 4. Do you use motors in connection with the cutting machines any where else except in that particular area?

A. Not to my knowledge.

Q. 5. Leaving that area to one side for the moment, what if any use does a machine cutter have for a motor in discharging his duties as a machine cutter?

A. The machine cutters generally start in the afternoon when the day shift comes off and they take a locomotive and ride the locomotive to the location where their machine is located, generally speaking, and leave that locomotive there until the shift is over with and ride that locomotive back. They don't use the locomotive for any other purpose only to ride it to their machine on the section.

[fol. 359] Q. 6. That's the general rule as to your machine cutters generally?

A. Yes.

Q. 7. In such cases, do they have any duties in respect to sanding or oiling the motor?

A. When they use a locomotive just for riding purposes, it is rare they sand it or oil it, because it only goes the distance from the drift into the section where the machine is.

Q. 8. Are there instances where they ride the machine cutter itself instead of the motor?

A. Yes.

Q. 9. Explain that, please.

A. Occasionally the machine breaks down or something needs to be repaired on it, and the machine crew will ride the machine all the way from their working section to the repair shop which is located outside.

Q. 10. Where, ordinarily, are the cutting machines left at the end of the shift?

A. They are generally left at the location which will be easy for the machine men to get to and start the shift the following day or the following shift. They generally have a machine hole where they put the machine, on each section.

Q. 11. When that is done, how does the machine man get from the outside to where his cutting is to be performed?

A. Over at No. 1 Mine, the machine men that cut down in Gravel Branch and First North Drainway, generally ride an empty train of cars into the dispatcher's office and go down and get their machine.

[fol. 360] Q. 12. And in other instances, do they take motors from the yard and ride those in?

A. Occasionally, they will take a motor not in use and ride it in for their convenience.

By the Court:

Q. 13. You refer some times to motor and some times to locomotive. Is there any difference in them?

A. No, they are the same.

Q. 14. When Senator Muse questioned you on yesterday and you were describing how the machine operator, when he began work, went and got his motor and oiled it and sanded it, were you speaking of a locomotive?

A. I was speaking of the locomotive.

By Mr. Richardson:

Q. 15. Has that kind of locomotive or engine any necessary bearing on the operation of a cutting machine?

A. No, not any except the condition we have on the parallel where we have steep grades.

Q. 16. I am talking about the actual cutting?

A. No.

Q. 17. The machine cutter is equipped with its own motor?

A. Yes, its own motor.

Q. 18. Which provides electric power to drive the cutting blade?

A. Yes, sir.

Q. 19. When you told Senator Muse about the machine man getting his fifty pounds of bits, those are to be used on his cutting machine?

[fol. 361] A. Yes.

Q. 20. They have nothing to do with the motor?

A. Have nothing to do with the locomotive.

Q. 21. I believe you answered the inquiry that there is no connection whatever between the use of the motor and the cutting machine. Is it not so where you have steep grades in the particular section of your No. 1 Mine referred to, you do require the use of the motor to hold the cutting machines in place where they are performing the cutting function?

A. That's true.

Q. 22. So to that limited extent, the motor is required in the cutting operation?

A. Yes, on that particular section, where we use a locomotive, we do not have a cable reel truck coupled on to the machine. The motor couples on to the machine direct.

Q. 23. You have referred to the one section in which this unusual operation occurs. How many motor crews are involved on that section?

A. That haul coal.

Q. 24. How many cutting machine crews operate on that section?

A. On the entire section, I believe there are three.

Q. 25. How many altogether in your mines that require the use of a motor in connection with the cutting operation?

A. We generally use two locomotives on that section, some times only one, depending on where the cutting is and how much.

Q. 26. And those two motors are the only ones that are used any where in either one of these mines in that connection?

[fol. 362] A. To my knowledge, it is. Down in No. 4 Mine, the machine crew down there uses a motor whenever there is one available to ride in and out. They have two sections down there, one called the No. 4 Mine and the other the No. 8 Butt. When they go down there, they take a motor, because they can make more time.

Q. 27. Approximately how many machine crews do you have all over your two mines?

A. We have——

Q. 28. Incidentally, you refer to No. 4 Mine. That's just a sub-division of No. 1 Mine?

A. That's right. On August 15th, we had twenty-one machine men at the No. 1 Mine and we had sixteen machine men at the No. 2 Mine at that time.

Q. 29. Are those numbers approximately correct as of now?

A. Yes. I also have it on November 1st.

Q. 30. That's all right. We are dealing in approximate numbers—and of these, two machine crews are involved in this exceptional operation that you have explained?

A. Yes.

Q. 31. And there are two men on each crew?

A. There are two men on each crew.

Q. 32. You say these machine men work between shifts?

A. Yes, they work between shifts. They start work generally as soon as they can after the day shift comes off the section. That isn't necessarily true with every section but over at No. 2 Mine, practically every machine man is there around four-thirty to start work, but at No. 1

Mine, some of them wait for all the men to come out, and [fol. 363] others ride the last trip of empties going towards the working places.

Q. 33. Who keeps their time?

A. The night foreman keeps the machine men's time.

Q. 34. How does he get a record of their time?

A. He keeps a record—he is not with them much of the time. The machine men is more or less by themselves in the section.

Q. 35. Then the night boss gets the time from the machine men themselves?

A. Yes.

Q. 36. In that way, they keep their own time?

A. In a way, they do, yes. Occasionally, a machine man might not see the foreman and he will put down a shift and the next time he sees them, he will ask them how much they worked. That's the way he is supposed to do. He keeps their time the same as any one else.

Q. 37. You have referred to the fact that ordinarily machine cutters are piece workers and are paid by the number of tons they undercut?

A. Yes, they are piece workers and paid by the work they do by tonnage.

Q. 38. You have also referred to the fact that there are certain hourly machine cutters. Explain under what circumstances that is true.

A. In sections where you don't have enough cutting to keep the machine crew busy, we pay those machine men by the hour, and in case they finish their work before the shift is over with, they do anything else that's to be done, help timber or lay track or anything that's required of them.

[fol. 364] Q. 39. Approximately how many men work on that basis?

A. I believe we have two crews at the No. 2 Mine.

By the Court:

Q. 40. How many men in a crew?

A. Two men, and at the No. 1 Mine, we have three crews that work that way. You have to divide your machine work according to the number of working places and the number of tons there are to be cut.

By Mr. Richardson:

Q. 41. Are the services incidental to the cutting of coal performed by these machine men operating in the two mines of the Jewell Ridge Coal Corporation those which, by long established custom and practice, have been performed by the machine cutters?

A. Yes, I think so. That practice has been in all mines that I have been connected with.

Q. 42. And it has been so at this mine?

A. Yes, it has.

Recross-examination.

By Senator Muse:

Q. 1. Mr. Hagy, as I understand, the only machine crew who uses a motor is up in Parallel?

A. Up in that section, to my knowledge.

Q. 2. Mr. George Johnson, who works in Second North and First North Drainway, uses a motor, doesn't he?

A. He uses one to ride in and out.

Q. 3. Does he work in Parallel?

A. No.

[fol. 365] Q. 4. Why didn't you name him?

A. To my knowledge, he does not use the motor to propel the cutting machine.

Q. 5. Did you say anything—he is assigned a motor, isn't he?

A. He rides a motor in and out. I have never been on his section when he was cutting.

Q. 6. How do you know he doesn't use the motor to propel his machine from place to place?

A. I don't know that he does use one.

Q. 7. You just don't know.

A. I don't know on any section. I am not around to see them.

Q. 8. Aren't you using five cutting machines at No. 2 Mine?

A. How many?

Q. 9. Five?

A. I believe five.

Q. 10. And three of them at that mine use motors, don't they?

A. To ride in and out.

Q. 11. To propel the machines?

A. They are arcwall machines that propel themselves.

Q. 12. Don't they use them to take them from one place to another? You just don't know?

A. I don't know of any reason why they would. The machines are self-propelling.

Q. 13. Suppose the distance is so great and the work assigned during the night is so great that in order to perform that work they have to use a motor?

[fol. 366] A. The arcwalls, those machines are supposed to tram at four miles an hour and most all the places where these machines work are close together except some of the sections—some are a little far apart.

Q. 14. Does a man work in two sections?

A. No.

Q. 15. Do you know whether or not that three of the machine crews at No. 2 Mine use a motor to transport that machine from cutting place to cutting place?

A. I don't know it. I haven't seen them.

Q. 16. Do you know they don't?

A. I don't know whether they do or do not. I just don't know exactly.

Q. 17. Take Mr. George Johnson, do you know whether he uses a motor or not to transport his machine from place to place?

A. No, I do not. He has a motor to ride.

Q. 18. These men who use a motor don't use a pony truck, do they?

A. The ones that push the machine and cut with a locomotive do not use a pony truck.

Q. 19. And their current comes through the locomotive?

A. Through the cable on the locomotive.

Q. 20. And if he didn't have that locomotive, he wouldn't have the cable?

A. He would have it on the truck.

Q. 21. He hasn't got the truck?

A. It is there for him to use.

Q. 22. How many of those men use the cable off the motor, if you know? I don't know whether you do or not.

[fol. 367] A. If there are any of them using it, I don't know anything about it. There may be several, but it is not sensible for them to use it.

Q. 23. Do you assign a pony truck to each of these cutting crews?

A. Yes, there is one for each machine. I don't know how many are used.

Q. 24. Do you know where those pony trucks are?

A. No, I do not.

Q. 25. You don't know whether there are pony trucks in the sections or not, do you?

A. I know they are some where. I don't know the exact location. Each machine has a pony truck and the ones the motors push, the pony trucks are set aside, some where.

Q. 26. So far as you know, three of the machine crews at No. 2 Mine use motors?

A. They may or may not.

Q. 27. You don't know?

A. No.

Q. 28. And at No. 1 Mine, there are several more than the crews in Parallel using motors?

A. To push the machine, I don't have any knowledge of any others except the ones in Parallel.

Q. 29. Do you know Mr. George Johnson?

A. Yes, I know Mr. George Johnson.

Q. 30. He is the gentlemen sitting behind me over here?

A. Yes.

Q. 31. Where does he work, do you know?

[fol. 368] A. No, I would have to look at the record. I don't have a record with me. Those gentlemen work on the night shift and I don't see them while they are working.

Q. 32. You have no idea where he works?

A. I would have to look the record up and see.

Q. 33. Don't you know which mine he works in?

A. Yes, No. 1 Mine.

Q. 34. These men who use the motor use the motor that's assigned to them, don't they?

A. They attempt to let the men use the same motor all the time, because he doesn't have to cut the cable to make connection.

Q. 35. And those men who don't use motors have to go up and get the two gallon oil can full of oil just the same?

A. Yes, sir.

Q. 36. And have to go and get the fifty pounds of bits just the same?

A. Yes.

Q. 37. And then ride the man-trip or at least ride a car in?

A. It's a man-trip, in a sense. It's an empty trip of cars returning from the tipple which they ride.

Q. 38. And they go as close as they can to where their machine is?

A. Yes, sir.

Q. 39. And they have to carry the fifty pounds of bits and the two gallons of oil?

A. Some of them walk it and some ride.

Q. 40. How far do they have to walk and carry the fifty [fol. 369] pounds of bits and the two gallons of oil?

A. It depends on how close they can get on these cars that come in.

Q. 41. Suppose they have to catch it up at the drift mouth?

A. Which drift mouth?

Q. 42. The portal where the men go in.

A. They catch the trip of empty cars there.

Q. 43. How far is that from where they get the bits?

A. Something like two hundred and seventy-five feet from where they get the bits in the shop.

Q. 44. And if they have any other equipment—every other day they have to carry about four pounds of cup-grease?

A. Yes, they have to carry some cup-grease.

Q. 45. So the men who don't have a motor assigned to them have to get the fifty pounds of bits, two gallons of oil, cup-grease, and they may have other equipment, too, to take with them for that machine; is that right?

A. Yes, occasionally they may have something that they need to take for the machine.

Q. 46. Some parts to be replaced?

A. Some times they have to take a pick with them that they bring to the shop and get sharpened.

Q. 47. And they may have to take some other pieces for that cutting machine?

A. Yes, occasionally, they take a sheave with them.

Q. 48. They catch a train going in and ride as far as they can?

A. That's true.

[fol. 370] Q. 49. And when they get off, they have to walk to wherever the machine is?

A. Yes.

Q. 50. Maybe a thousand or fifteen hundred feet, or less, of course?

A. That's true.

Q. 51. And whatever distance it is up to a thousand or fifteen hundred feet, whatever it is, they have to walk and carry that same equipment?

A. That would only be to the section that the men do not have motors to ride on.

Q. 52. I am talking about a man not riding one of these motors, a walking machine cutter, he has to walk whatever distance it is up to fifteen hundred feet, in some instances, carrying all this equipment I have talked about?

A. Yes. That's at No. 1 Mine, the ones that don't take motors.

Q. 53. And they have to walk in that stooped over position, depending on how high the roof is from the bottom?

A. That's right. They have to walk stooped over where the roof is low.

Q. 54. There are very few places where they can walk straightened up?

A. It depends on where it is. Down on Gravel Branch, a very short distance, a man can walk standing up.

Q. 55. But if he goes to Parallel and First North, he has to stoop over?

A. Yes, the coal is only about forty-six inches thick [fol. 371] down there.

Q. 56. And when he gets to his machine, he has to sand it?

A. No. You don't sand the machines. They don't have any sand-box.

Q. 57. He has to oil it?

A. Yes.

Q. 58. Put the grease in?

A. Yes.

Q. 59. And put the bits in?

A. Yes.

Q. 60. And use the pony truck that has a cable on it and hook on to the wire and proceed ahead. That's what that man does, isn't it?

A. Yes.

Q. 61. The only difference between what he does and what the man who has a motor assigned to him does is that he has to catch a trip in and he doesn't have to do any sanding and oiling of his motor?

A. The man would prefer to use a locomotive to ride back and forth, because he gets there quicker. It gives him an advantage to get outside better when the shift is over and there is some advantage to the man using a motor to ride in and out on.

Q. 62. Also he can use his motor to take his machine back and forth faster?

A. It helps him on sections where he uses the locomotive to tram the machine.

Q. 63. And if the machine man hasn't got a motor assigned to him, he gets out the best way he can?

[fol. 372] A. He rides an empty car on the rear end of a load trip and he has to walk up the hill.

Q. 64. Isn't that against the rules, to ride on a load trip?

A. An empty car on the rear, no.

Q. 65. That is a coal trip?

A. No, that is the only way you have of getting a man out.

Q. 66. Is there anything in the rules saying that or are you just saying it?

A. No, that's a rule. I don't believe it is in here, but that's the rule.

Q. 67. Any way, getting out, he has to come out the best way he can,—he has to catch a trip the best way he can, coming out?

A. The first load trip he has an opportunity to catch.

Witness stands aside.

E. R. Burke, another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Stuart:

Q. 1. You are Senator E. R. Burke?

A. Yes, sir.

Q. 2. What connection have you with the coal mining industry at the present time?

A. I am President of the Southern Coal Producers Association.

Q. 3. I believe you are a lawyer?

[fol. 373] A. Yes.

Q. 4. Formerly United States Senator from the state of Nebraska?

A. That's correct.

Q. 5. When did you become President of the Southern Coal Producers Association?

A. Upon its organization on March 17th, 1942. The Articles of Incorporation of the Association had been filed the previous October, and the intervening time spent by a Committee in perfecting the organization, and I became the first President of the Association on March 17th, 1942.

Q. 6. Will you please describe the Association to the Court as to the area which it covers, the amount of production of coal, the approximate number of operating units, the approximate number of men employed and a few general items of that kind which will give the Court a picture of the character of this Association?

A. The Association is composed of fourteen District Associations, which constitute all of the District Associations in Southern West Virginia, Eastern Kentucky, Virginia, and Northern Tennessee,—one in Virginia, three in Kentucky, one in Tennessee and the remainder in Southern West Virginia. There are, in addition, a few individual companies that belong, that do not, for one reason or another, maintain membership in the local or district association in which their properties are located. This area produces something like two hundred million tons of bituminous coal a year, possibly a little less than that in the membership of our Association, as there are a few captive [fol. 374] mines in this District and I think that tonnage is included. That would be approximately one-third of the total bituminous production in the country. I believe the member companies employ something like one hundred and sixty-five thousand men at the present time.

Q. 7. Is the plaintiff here, Jewell Ridge Coal Corporation, within the Southern Coal Producers Association?

A. Yes, it is a member of our Association.

Q. 8. Now, there has been introduced in evidence already among the documents exhibited the last contract, basic wage contract, being that which was dated April 1, 1941, and there has already been testimony as to that contract and as to the bargaining relationships and their results prior thereto. I would like to ask you now, Senator, to start from that contract and proceed with the factual narrative so as to bring the picture down to date. That con-

tract, by its terms, was a two-year contract expiring March 31st, 1943,—covering the period April 1, 1941, to March 31, 1943. What was done in regular course, if anything, looking to the negotiation of a new agreement as March 31, 1943, approached?

A. Let me say first, that the contract to which you refer was effective from April 1, 1941, but was not actually dated until July 5, 1941, was the date of its execution, but it was effective, retroactive to April 1, 1941, and ran to midnight March 31, 1943. The contract itself contains a provision that the parties, in that case being the fourteen District Associations on the one side and the United Mine Workers on the other, should meet at the Hotel Commodore in New York on the 14th of March, 1943, to consider what, if any, changes should be made in the hours, wages and working [fol. 375] conditions set forth in the contract for the ensuing period. The date was advanced by mutual consent and the Southern Coal Producers Association had become the bargaining agent for the fourteen District Associations, so we met in New York on the 12th of March, with our negotiating group and the negotiating group representing the United Mine Workers, which included our friend, Mr. John Saxton, who is here as a representative of this District, and the District Presidents of the various United Mine Worker Districts in the Southern Area, and the chief negotiators on the part of the Union were Vice-President John O'Leary, Major Percy Tetlow, the Technical Advisor to the President of the Union, and various other officials of the Union. Do you desire me to go on and tell briefly the story of these negotiations?

Q. 9. I would like to ask you one or two other preliminary questions: These negotiations began in New York on what date?

A. The 12th day of March.

Q. 10. And they continued at that point how long?

A. We continued in New York for approximately six weeks, possibly a little longer than that. I can't give you the exact date. We continued until the wage dispute had been certified to the War Labor Board by the Secretary of Labor, and then the operating groups came to Washington to appear before the War Labor Board, by its direction. The representatives of the United Mine Workers did not choose to obey that summons and did not appear before the War Labor Board, and after various proceedings be-

fore the War Labor Board, negotiations were resumed in Washington between the operators and the representatives of the United Mine Workers under directions laid down [fol. 376] by the War Labor Board, and those negotiations continued until the 20th day of June, when it was—when the matter of negotiation ceased and the War Labor Board took complete charge of this case then.

Q. 11. Now, when that first break in negotiations occurred, at the end of which they were resumed in Washington, did that break occur before or after the first strike which began, I believe, May 1st?

A. Very considerably after the first strike.

Q. 12. The New York negotiations continued into the period of the first strike; is that correct?

A. Yes. I am quite sure I am correct on that.

Q. 13. Now, were there any joint or general meetings of the two groups at which the views of Mr. Lewis, the President of the United Mine Workers, were expressed? Did you have an opportunity to hear directly his views on the Union's objectives in these negotiations?

A. Yes. I believe there was only one occasion when both the Northern and Southern negotiating groups had a meeting together with Mr. Lewis and the entire negotiating committee for the Union, but on very frequent occasions, I was in conference with Mr. Lewis, to have the expression of his views, although he conducted the negotiations with the Northern Group in the Biltmore Hotel, and as I say, Mr. O'Leary, the Vice-President, and Major Tetlow conducted the negotiations in the adjoining hotel with our group.

Q. 14. Coming down now to the objectives of the Union as to changes which they desired to have made in the [fol. 377] Agreement, I will ask you what changes they particularly emphasized during the earlier stages of these negotiations?

A. If I may be permitted, I would like to make this suggestion: Counsel for the defendants submitted through Mr. Richardson, a list of the demands that were presented by the Union, and at Mr. Richardson's request, I examined that document and found it to be correct and initialed it, and if that is to be introduced in evidence, it would be helpful if it were available at this moment. I have a copy of it.

By Mr. Rogers: We haven't decided whether we will put it in or not.

By Mr. Stuart: We don't propose to introduce it. We merely want it for the use of the witness.

A document was thereupon produced by counsel for the defendants and handed to Mr. Stuart.

By Mr. Stuart: I will ask the reporter to mark this document for identification, entitled: "Wage Scale Increases Asked and Proposed Corrections of Mining Practices for the Bituminous Coal Industry Adopted By the International Policy Committee of the United Mine Workers of America,—New York, N. Y., March 9, 1943".

The document referred to was thereupon marked by the reporter: "No. 1 for identification—U. D. W. 11-20-43".

A. This paper that I hold in my hand and marked for identification "No. 1", contains a true and correct statement of the wage scale increases asked and proposed corrections of mining practices for the bituminous coal industry, which were presented to both conferences in the Appalachian area, in New York at a meeting in the Biltmore Hotel on March 10th, which I attended, which was a meeting of the Northern Appalachian Conference. Mr. Lewis, President of the United Mine Workers of America, presented these demands and discussed them in detail, and throughout the entire day of March 10th, presented his arguments in reference to the demands. Two days later, on March 12th, when our Conference opened, Mr. O'Leary moved that the demands and the explanatory statement of Mr. Lewis and his argument in support of the demands as presented to the other Conference be incorporated in our record without repetition, and I seconded that motion and that was done, and they appear in the official record of our proceedings in like manner as if they had been presented there in the first instance by Mr. Lewis himself. —There is a very grave danger I see, on the part of a witness who is not under restraint, in going a little far afield in matters that have been so foremost in our minds during these past several months.

By the Court: I think counsel had better direct the examination because I do not think it is necessary or material to go into all the ramifications of these Conferences.

I think the general outline of the negotiations is a proper part of the record, as it has its bearing upon the matter of the existence of an actual controversy and the history of the current background of the employer-employe relationship here involved, but I do not think it necessary or appropriate that all the details or ramifications of these Conferences be put into this record.

By Sen. Burke: If the Court will permit me, I was going to say I would try to confine myself strictly to the point I deem material, and if Mr. Stuart finds me wandering, I hoped he would bring me back.

Q. 15. If you will state what you have in mind, but what I was going to direct your attention to was the particular items which showed particular emphasis on the part of the United Mine Workers through the earlier stages of [fol. 379] the negotiations? What was developed as to what they were really after?

A. The United Mine Workers left no doubt on that point. What they wanted, first, foremost and all the time was a $2.00 a day wage increase. As Mr. Lewis stated to me and to all of us on many occasions, that meant two dollars, not a dollar and ninety-nine cents. They wanted two dollars, no more and no less, and throughout our entire proceedings, beginning in March until June 20th, that was the demand. Everything else that is referred to played a part only as it bore upon that demand, and in reference to this matter before the Court here, travel time and portal to portal pay, I want only to refer officially to the reference that they make in this proposal. Number Two, dealing with hours of labor, is divided into two sections, and "b", which has been read, is: "To conform with the basic and legal requirement for the industry, the maximum hours and working time provisions be amended to establish portal to portal for starting and quitting time for all underground workers"; and, in "3"—"Wage Rate Increases", appears first the demand for the two dollar a day increase, and then there follows a little later the statement: "The increased rates include compensation to meet the portal to portal starting and quitting time". Those are the only references to portal to portal or face to face in the demands, and throughout all the entire proceeding, there was never any suggestion made in my presence by Mr. Lewis or any negotiator for the Union that they wanted to abandon the

face to face method and go to portal to portal. That was never the thing in mind. They were talking travel time a great deal, we discussed that at great length, but that was [fol. 380] only in justification of the two dollar increase that was demanded, and when it appeared that—when they became certain that the operators would not join with them in presenting to the War Labor Board an agreement providing for a two dollar a day increase, and when it appeared certain, under the Little Steel Formula of the War Labor Board, there could be no straight wage increase granted, then emphasis was all placed upon what they called loosely the "portal to portal controversy", the "portal to portal problem", but which was not the matter before the Court here but was only the question of agreeing to pay for travel time as the only feasible means of getting a wage increase, and not at all changing the system to apply strict portal to portal.

By Col. Harris: If the Court pleases, I don't want to interrupt the witness, but may be follow the procedure of making a motion to exclude afterward. A great deal that he says involves conclusions and opinions and not statements of fact, but his conclusion as to where emphasis was placed and we conceive that a great deal of it is not admissible testimony, but in order not to take up undue time, if it is agreeable to the Court and the opposition, we will make a motion to exclude later.

By the Court: The testimony may be received, subject to the right of the attorneys to move to strike out such portions as they deem inadmissible, immaterial or impertinent, in a legal sense.

A. I would like to correct any wrong impression I may have given by making a statement as to where emphasis was placed. It wasn't a question of placing more emphasis upon the wage increase or portal to portal as there was a total absence of any suggestion that the method of pay be changed to portal to portal. The whole argument and everything presented was in favor of a wage in- [fol. 381] crease that under the circumstances, had to be disguised, we will say, as a payment for travel time, but without any change of the system really putting the portal to portal principle into effect.

Q. 16. Was there at any time during the earlier weeks or

months of negotiation any proposal made by the Union or any willingness expressed by its negotiators to increase the productive time above the seven hour day which had already been in effect for so long?

A. The matter was discussed frequently, and there was no willingness at any time on the part of the Union representatives to increase the productive time. When I proposed that matter to Mr. Lewis in person, that we might increase the productive time at the face from seven hours to eight hours, with time and a half for the eighth hour, Mr. Lewis' reply was: "What we want is not more pay for more work performed; we want and think we are entitled to more pay for the same amount of work."

Q. 17. Was there any departure from or any desire to abandon the principles contained in the Houck letter during all these earlier weeks and months of these negotiations?

A. There was not.

Q. 18. Has there ever been any agreement arrived at between the Union and the operators to this day as a result of those negotiations?

A. No. That should be qualified to this extent, that the War Labor Board, after hearings, made certain directives that did change the terms of the 1941 Agreement, for instance, in increasing the vacation allowance from twenty to fifty dollars, and the operators accepted those changes and [fol. 382] the Union accepted them and they have been applied,—there are quite a large number of those items, so while no agreement has been entered into, signed by both parties, making any changes, there are a very large number of changes that, by common consent, at least, are now in force, obligations that are being met by the operators, benefits that are being accepted by the miners.

Q. 19. But no new contract, so far as the Southern Coal Producers area and so far as the Northern area is concerned, has yet been arrived at?

A. That is correct.

Q. 20. Now, you mentioned that there was an earnest effort by the Union to get the operators to join with them in submitting a contract to the War Labor Board, which would approve a wage increase. What was the difficulty about awarding a wage increase so far as the War Labor Board was concerned?

A. The difficulty was this: That under the Wage Stabilization Act passed by Congress that became effective October 2, 1942, wages were to be stabilized as nearly as practicable as of that date, and the Administrative agency of the Government largely in charge of enforcing the Stabilization program had worked out what is popularly called "The Little Steel Formula," which provided that since there had been an increase in living costs from January 1, 1941, up to the time that they were making their decision effective of approximately fifteen per cent, that the Board determined that no increases would be granted to any employes who had already received as much as a fifteen per cent increase, unless for certain minor exceptions which I will not go into, and in the case of the Southern operators, [fol. 383] the 1941 Wage Agreement provided for a twenty-five per cent increase in the basic rate and a corresponding increase largely through the other classifications, so that there was no opportunity to maintain both the stabilization program and the Little Steel Formula and grant any increase to the miners in our employ, so we couldn't reach an agreement.

Q. 21. I will ask you a little later to introduce the text of the pertinent War Labor Board decisions, but at this point, will you state generally whether that question came specifically before the War Labor Board in the course of this controversy and what definite position, if any, it took in regard to an increase to the coal miners?

A. It did come specifically before the Board, although one party to the controversy, the United Mine Workers, refused to appear, it being stated publicly and in various documents I have here by Mr. Lewis that he could see no advantage in going before a Board that had already committed itself to a doctrine that would make it necessary to find against him on the matter, but the Board, however, did consider the matter and did specifically rule that no wage increase could be granted to the miners under the stabilization program.

Q. 22. With regard to the action of the Union in boycotting the Board hearings, I believe that it was changed after Congress enacted the War Labor Disputes Act, was it not?

A. In point of time, the change in the Union's position did follow the enactment of the Labor Disputes Act.

By the Court:

Q. 23. Is that what is commonly known as the Smith-
[fol. 384] Connally Act?

A. That's right.

By Mr. Stuart:

Q. 24. That was June 25th, I believe?

A. The effective date of the Act, yes. If I may say this further to your question, the representatives of the Union appeared before the War Labor Board for the first time when the Board was considering what we call the First Illinois Supplemental Agreement, and Mr. Crampton Harris appeared at that time and made the argument in support of that Supplemental Agreement and Mr. Lewis was there and made a statement to the Board, and that was the first appearance.

Q. 25. That was approximately when?

A. July 23rd, I believe, was the date of the Agreement, and the hearing before the Board was within a week or ten days after that, I believe. Any way, as asked, it was after the Smith-Connally Act became effective and I think the Union representatives had said that that was responsible for their change in position and their willingness to appear before the Board, although I wanted to make it clear that there was more to it than that.

Q. 26. The First Illinois Supplemental Agreement, I see, was dated July 20th, and the Board's order thereon was dated August 24th. Now, this controversy was actually certified to the National War Labor Board at quite an early stage, was it not, in the controversy?

A. Yes, comparatively speaking. After six weeks, about six weeks of hearings in New York, it was certified to the War Labor Board.

[fol. 385] Q. 27. Certified to the War Labor Board before the first strike began on May 1st?

A. Yes.

Q. 28. With reference to the relative positions of the Union and of the War Labor Board and their respective policies that you have expressed, what can you say as to expressions on the part of Union representatives with regard to stabilization of wages and protection against inflation during these negotiations?

A. Mr. Lewis, during his opening statement to the Conference, and on many occasions thereafter, as well as other authorized representatives of the Union, stated to us over and over again that inflation was already here, that the stabilization program could not and should not be maintained, and that they were then doing and would do all they could to see that the stabilization program was not made effective, as far as they were concerned, because they didn't think it was effective so far as others in our economic society were concerned.

Q. 29. When was it, I mean as to the successive stages in these negotiations and in the development of the controversy, at what point was it that the portal to portal demand on the part of the Union took on substance as upon an actual portal to portal basis rather than as a disguise, as you have expressed it, of a demand for a general wage increase?

A. Almost immediately following the rejection by the War Labor Board of the First Illinois Supplemental Agreement, which I believe you have said, was August 24th.

Q. 30. And that was not until after the decision on the first Illinois Supplemental Agreement by the Board?

[fol. 380] A. That's right.

Q. 31. Could you say or not as to whether that was after prolonged and earnest efforts on the part of the Union to obtain a wage increase in various other ways?

A. Efforts prolonged to cover the entire period from March 10th to that date, and vigorous and forceful to the last degree and confined solely to the matter of endeavoring to obtain a wage increase.

Q. 32. Now, you have said that up to that time, there was no desire expressed by the Union representatives to depart from the principles of the Houck letter, but on the contrary, they sought to preserve the seven hour production day?

A. That is correct.

Q. 33. I should like you to give your views, Senator, as to whether the portal to portal basis for compensating employes in the bituminous coal industry, and in particular for compensating the piece workers who are such a large element in that industry, is a practical basis, under the conditions of what we might call normal marketing and competitive conditions, and in connection with that, I want to read you for your comments a paragraph which I see in this morning's newspaper, The Roanoke Times, dated from Washington, November 19th, an AP Dispatch: "Soft

coal operators complained today that their money had been used 'without any trace of consent' to pay for Federal operation of the mines and declared that they must have official assurance of higher prices to cover their costs. Unless the Government acts quickly and adequately to so assure them, they said in a letter to Stabilization Director [fol. 387] Fred M. Vinson, many of them will not be able to finance government operation of their property beyond next week."

A. In answer to the first part of your question, I think it would be some what out of place and not of importance for me, with my training and background, to express an opinion on the relative merits of the face to face method of computing pay as contrasted to the portal to portal. I would only say I subscribe fully to the views expressed by Mr. O'Neill and Mr. Morrow on the stand here in court and as expressed by Mr. Houck and Mr. O'Neill and others in the letter of July 9th, 1940, that they submitted to Administrator Fleming, and I could only say that my limited contact with mining operations, but very close contact with mine operators during the past two years, has convinced me that Mr. O'Neill described the matter with entire correctness when he said that after a long period of constructive moves, the Union, under the exigencies of the present moment, as it seems, is now embarked upon a fully destructive move in attempting to impress this change upon the industry, and it is my firm conviction that the move would be destructive to a very great extent, both as to the best interests of the operators and the miners alike, to make the change. In reference to the matter that you have just read, which arises out of a conference now going on in Washington, called by Secretary Ickes, and in which the Union and Mr. Lewis are participating, and many operating groups are participating, I could only say that in the First Illinois Supplemental Agreement and the Second Illinois Supplemental Agreement, and necessarily incorporated by reference in the Ickes-Lewis Agreement, is the provision that these increased wages shall not become [fol. 388] effective until the OPA and the Stabilization Director have granted an increase in maximum cost so that the entire additional burden can be passed on to the consumers of coal, as it is admitted by all Governmental agencies familiar with the matter that the coal industry itself cannot bear these additional burdens to any extent whatever.

By the Court: Is there in the record, gentlemen, a copy of the provisions in the Illinois Agreement and the Ickes-Lewis Agreement relative to portal to portal pay?

By Mr. Stuart: Not yet, Your Honor. We intend to put them in.

By the Court: I would like to have the actual documentary treatment of the question as embodied in those agreements.

By Mr. Stuart: We propose to document this period from March 31st very fully and to ask this witness for comments on the points.

Q. 34. Senator Burke, in your answer that you have just made you spoke of the necessity for the OPA to allow maximum cost. I take it instead of cost you meant price?

A. Increase the maximum price to cover fully the increased cost that would be involved by putting the new program into effect.

Q. 35. You said to increase the maximum cost. You meant "price"?

A. Increase in the maximum cost would be accomplished very fully by putting into effect the program.

At this point a recess for the period of fifteen minutes was taken.

Q. 36. Taking up now the factual narrative and starting [fol. 389] at the point where the negotiations were being conducted in New York last March, I want to bring the narrative on down to date, and I want to note, as we go along, the extensions, if any, of the contract of April 1, 1941. As the date March 31, 1943, approached, and no agreement was in sight, did the President of the United States enter the picture in any way?

A. He did, yes, by telegram addressed to the spokesman for each of the operating groups and to Mr. Lewis, as spokesman for the United Mine Workers, an identical telegram being sent to each of the parties under date of March 22, 1943.

Q. 37. Have you the original telegram addressed to you by the President?

A. I have.

Q. 38. I will ask you to introduce that telegram in evidence, marked "Plaintiff's Exhibit No. 29."

By Col. Harris: We offer the same objection to all these documents. We make no point on authenticity or correctness but the same general objection we have heretofore interposed.

By the Court: Let it be so noted that the defendants, by counsel, object to this and succeeding documents shortly to be presented, upon the grounds heretofore stated, and the Court treats the objections as motions to strike, and the documents are admitted upon the same conditions that the documents heretofore have been admitted.

By Mr. Stuart: May it be further understood that all documents to be introduced by this witness have been submitted to the defendants and they make no objection on the ground of authenticity?

By Col. Harris: There were three or four we didn't have.

By the Court: They may be admitted with the understanding that if any question as to their correctness arises [fol. 390] before the trial closes, such objection shall be stated.

By Mr. Stuart: In the case of this Exhibit 29 and certain other papers, they are originals and if there is no objection, we would like to withdraw the original and substitute a copy.

A. I file same.

A copy of the telegram referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 29", and is returned as a part of this transcript.

Q. 39. Now, subsequent to the receipt of that telegram from the President, did the negotiators arrive at an agreement for the extension of the contract?

A. They did. On March 29th, in the Southern Appalachian Joint Wage Conference, an agreement was signed by the operators negotiating committee of the Southern Appalachian Joint Wage Conference and by the negotiating committee of the United Mine Workers of America, in that conference. That's my copy of the original document.

Q. 40. You have handed me an original signed copy of a document headed: March 29, 1943. Southern Appalachian Joint Wage Conference", and I will ask you to introduce it as "Plaintiff's Exhibit No. 30".

A. I will.

The document referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 30", and is returned as a part of this transcript.

Q. 41. As the month of April drew towards a close, did the War Labor Board, through its Chairman, William H. [fol. 391] Davis, enter the controversy?

A. He did and I hold in my hand a wire addressed to me by Chairman Davis, dated April 23, 1943.

Q. 42. Will you introduce in evidence the telegram in question, marked "Plaintiff's Exhibit No. 31"?

A. I will.

The document referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 31", and is returned as a part of this transcript.

Q. 43. Pursuant to that telegram, was a hearing held by the War Labor Board, and if so, have you a copy of the order entered by the Board at such hearing?

A. Yes. The hearing was held on April 24th, and the representatives of the Operators Negotiating Committee were present. The negotiators for the United Mine Workers were not present.

Q. 44. I ask you to file in evidence a copy of the Board's Order of April 24, 1943, marked "Plaintiff's Exhibit No. 32".

A. I will.

The document referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 32", and is returned as a part of this transcript.

A. I would like to make a brief statement in reference to that hearing on April 24th, just quoting two sentences that were state dby the Board at that public hearing, in my presence, on April 24, if I may.

Q. 45. Very well.

A. Dean Wayne Morse, Public Member of the Board, [fol. 392] was charged with the responsibility of presenting the Board's views, and he made in my presence this statement: "It is the unanimous position of the Board that the old contract continues to be extended in accordance with our previous order, to such time as the Board hands down a decision on the merits, and that, therefore, any stoppage of work on the part of the United Mine Workers of America

constitutes a violation of the contract, which the Government, functioning within its war powers, has directed the parties to extend until such time as the case is settled on its merits by the National War Labor Board. That is the unanimous decision of the Board. Mr. Lewis will be apprised of that fact before the day is out, and, therefore, you will proceed under the old contract as extended". And at the same hearing, just before the close, Mr. Van Bittner made a statement, in which is the following: "First, by action of this Board, there is a contract between the United Mine Workers of America and the operating groups in the bituminous coal fields".

Q. 46. Those statements which you are reading, were they not made at the May 17th meeting, and not the April 24th meeting?

A. I was under the impression that was April 24th. No, I guess maybe you are right on that. I have gotten ahead of my time. Let me finish my statement, but have the date corrected to May 17th. At the same hearing, on May 17th, when the same parties were present as on April 24th, and after the statement made by Mr. Morse, in my presence, only one paragraph of which I have read, Mr. Van Bittner said: "I would just like to make one statement before the meeting adjourns, on two points. First: By action of this Board there is a contract between the United Mine Workers of America and the operating groups in the bituminious coal fields".

[fol. 393] Q. 47. Who was Mr. Van Bittner?

A. He is a Labor Member of the Board, formerly District President, I believe, for the United Mine Workers in this Southern Area.

Q. 48. Now, when the thirty day extension which was previously agreed upon expired on May 1st, what happened then?

A. There was a work stoppage at that time.

Q. 49. Did the Government take a hand in that, and if so, what did it do?

A. The Government seized the mines on that day.

Q. 50. Following that occurrence, did the War Labor Board issue an Interim Directive Order under date of May 14th, 1943?

A. The Board did issue such an order and a copy of that order is contained in the paper which I hold in my hand.

Q. 51. I will ask you to file a copy of that order as an Exhibit with your evidence, marked "Plaintiff's Exhibit No. 33".

A. I will.

The document referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 33", and is returned as a part of this transcript.

Q. 52. Now, at that time, Senator Burke, did the War Labor Board have the Houck letter before them? Were they familiar with the Houck letter?

A. Yes.

Q. 53. And the Administrative ruling thereon?

A. Yes, the entire matter and all the circumstances in relation to the Houck letter and copies of the letter and the [fol. 394] Administrative Ruling were part of the record before the Board prior to that time and were discussed at length before the membership of the Board.

Q. 54. Did the President place a member of his Cabinet in charge of the bituminous coal industry upon the Government seizure, and if so, who?

A. The President, by Executive Order, placed Secretary of Interior Harold Ickes in charge of the mines.

Q. 55. Did Secretary Ickes send John L. Lewis, President of the United Mine Workers, a telegram under date of May 17th, 1943?

A. A copy was received by me in my official capacity from the office of the Secretary of the Interior, stating that it was a copy of a telegram that the Secretary had sent to Mr. Lewis.

Q. 56. Is that the paper which you hold in your hand?

A. That is a copy of it.

Q. 57. I will ask you to introduce a copy of that telegram of May 17th in evidence, marked: "Plaintiff's Exhibit No. 34".

A. I will.

The document referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 34", and is returned as a part of this transcript.

Q. 58. Did Mr. Lewis reply to the telegram of Mr. Ickes, also under date of May 17th?

A. Yes, a copy of the telegram was furnished to me under the same circumstances as the telegram from Mr. [fol. 395] Ickes to Mr. Lewis.

Q. 59. Is that the paper which you hold in your hand?

A. That's a copy of it.

Q. 60. I will ask you to file that telegram in evidence as: "Plaintiff's Exhibit No. 34-A".

A. I will.

The document referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 34-A", and is returned as a part of this transcript.

Q. 61. You have already referred to the Board hearing of May 17th, at which the statements which you have quoted by Dean Morse and Mr. Van Bittner were made. After that and other hearings, did the War Labor Board issue a paper entitled "Comments and Directive Order—May 25, 1943"?

A. That was done, yes, sir, and I hold in my hand a copy of the Comments and Directive Order so issued.

Q. 62. Will you file that document in evidence, marked as "Plaintiff's Exhibit No. 35".

A. I will.

The document referred to was thereupon filed, marked as "Plaintiff's Exhibit No. 35", and is returned as a part of this transcript.

Q. 63. Now, when the end of that expiration was reached on May 31st, was there a further strike by the coal miners?

A. There was another work stoppage at that time.

Q. 64. And on June 1st, did Mr. Ickes send Mr. Lewis a [fol. 396] telegram?

A. He did, and a copy of it is now held in my hand.

Q. 65. Will you file a copy of this telegram of June 1st from Mr. Ickes to Mr. Lewis as "Plaintiff's Exhibit No. 36"?

A. I will.

The copy of document referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 36", and is returned as a part of this transcript.

Q. 66. On June 3rd, did the President of the United States again enter the situation and send a telegram to Mr. Lewis?

A. I am not certain about the telegram to Mr. Lewis, but on June 3rd, the President of the United States made a public statement, copies of which were furnished to me officially from—I think they came through the office of War Information; and that is a copy of the statement made on that date.

Q. 67. Will you file the copy of the President's statement of June 3rd in evidence, marked as "Plaintiff's Exhibit No. 37"?

A. I will.

The document referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 37", and is returned as a part of this transcript.

Q. 68. Thereupon, did the United Mine Workers direct the miners to return to work and did they do so?

A. I believe orders were issued directing the miners to return to work, and if I recall it, there was some delay in all of them doing so, but eventually, they did.

[fol. 397] Q. 69. They were directed to return on June 20th?

A. That is correct. When the order was issued, it directed their return up to June 20th.

Q. 70. Thereafter, did the National War Labor Board issue its opinion on the coal wage controversy under date of June 17th? I have handed you the opinion handed down by the Board in deciding the controversy on June 17th.

A. Yes. In this document there is contained the opinion of the Board in the matter, dated June 17th, the dissenting opinion of certain members of the Board, and special concurring opinion by Dean Morse and the usual public release in reference to the document.

Q. 71. Will you file that document, dated June 17th, 1943, in evidence as "Plaintiff's Exhibit No. 38"?

A. I will.

The document referred to was thereupon filed, marked as "Plaintiff's Exhibit No. 38", and is returned as a part of this transcript.

Q. 72. The document which you introduced as Plaintiff's Exhibit No. 38 had appended to it, as I believe you said, a statement issued by the Chairman of the Board, William

H. Davis, at the time of handing down the opinion, and I will ask that that statement be filed as "Plaintiff's Exhibit No. 38-A".

A. I file same.

The document referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 38-A", and is returned as a part of this transcript.

[fol. 398] Q. 73. Under that opinion which is Plaintiff's Exhibit No. 38, did the Board on June 18th, 1943, issue a Directive Order?

A. It did, and I hold in my hand a copy of the order so issued.

Q. 74. Will you file this copy of the order of the Board, dated June 18th, 1943, as "Plaintiff's Exhibit No. 38-B"?

A. Yes.

The document referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 38-B", and is returned as a part of this transcript.

Q. 75. Now, when June 20th, 1943, rolled around, was there another strike?

A. Yes, there was.

Q. 76. But I believe the President of the United States issued an appeal and the miners, on June 23rd, were directed by the United Mine Workers to return to work up to October 31st?

A. That is correct.

Q. 77. Under date of July 20th, was an Agreement reached between the Illinois Coal Operators Association and the United Mine Workers?

A. Well, I was not present at the making of the Agreement but I was present at the hearing before the Board and it was there stated that the Agreement had been reached on July 20th.

Q. 78. Were you furnished with a copy of the Agreement?

A. At the date of the hearing on it, yes.

Q. 79. Have you a copy of the Agreement?

A. Yes, this is a correct copy of the Agreement to which [fol. 399] you refer.

Q. 80. Will you file the copy of the Agreement of July 20th, which we shall call the First Illinois Supplemental Agreement, as "Plaintiff's Exhibit No. 39".

A. I will.

The document referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 39", and is returned as a part of this transcript.

Q. 81. Did that First Illinois Supplemental Agreement come before the National War Labor Board for consideration and did the Board hold hearings in connection therewith?

A. It did. It came before the Board for public hearing at which I was present, but not as a participant, and under date of August 24th, the Board handed down its decision in the matter.

Q. 82. Is this paper which you have handed me a copy of the Board's opinion and order of August 24th, 1943?

A. It is.

Q. 83. Will you file the Board's Order of August 24th as "Plaintiff's Exhibit No. 39-A" and the Board's Opinion of the same date as "Plaintiff's Exhibit No. 39-B"?

A. Yes.

The documents referred to were thereupon filed, marked, respectively, as: "Plaintiff's Exhibit No. 39-A" and "Plaintiff's Exhibit No. 39-B," and are returned as a part of this transcript.

Q. 84. I believe the effect of the Board's decision and [fol. 400] order of August 24th was to disapprove the First Illinois Supplemental Agreement?

A. Well, the Order, of course, speaks for itself, but if I might be permitted to say, the Board said that certain parts of the Agreement were not matters involving wage increases, and, therefore, neither approved nor disapproved them, but did disapprove the agreement, because of the provision for the payment of $1.25 a day for the settlement of all liability for travel time, which the Board declares in its opinion would be a wage increase.

Q. 85. Did the Illinois Coal Operators Association and the United Mine Workers arrive at a second agreement, which I shall call the Second Illinois Supplemental Agreement, under date of September 23, 1943?

A. They did reach such an agreement, and a copy of that agreement was furnished me from official quarters, I think directly from the War Labor Board.

Q. 86. Have you a copy of that Agreement in your hand?

A. I do.

Q. 87. Will you file that copy of the Second Illinois Supplemental Agreement as "Plaintiff's Exhibit No. 40"?

A. Yes.

The document referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 40," and is returned as a part of this transcript.

Q. 88. Did the Second Illinois Supplemental Agreement come before the National War Labor Board for consideration and decision?

[fol. 401] A. There was a public hearing before the War Labor Board, at which I appeared and testified or argued on behalf of the Association that I represent, and the United Mine Workers and the Illinois Operators and the Northern Appalachian Operators also appeared and participated in the hearing, and there was a decision rendered by the Board under date of October 26th, 1943.

Q. 89. Have you a copy of the Board's decision in your hand?

A. I do so have.

Q. 90. Will you file that copy as "Plaintiff's Exhibit No. 40-A"?

A. Yes.

The document referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 40-A," and is returned as a part of this transcript.

Q. 91. In general, I believe the effect of that decision was to approve the Agreement, except as to a certain amount of the wage increase that was allowed, amounting to 37½¢ per day?

A. That is correct.

Q. 92. But the Board did not approve the Agreement as it was tendered by the parties?

A. That is right.

Q. 93. Now, in connection with this Second Illinois Supplemental Agreement, which, in an amended form, I believe, finally became the Agreement, setting forth or specifying the terms and conditions upon which the industry is

now operating, I want to ask you whether you have any figures which compare the Illinois Field and the West Virginia-Virginia Field in respect to operating conditions, and [fol. 402] if you have, I will ask you to read those figures for the year 1939 and for the year 1941, as to each of these three Areas, namely, Illinois, West Virginia and Virginia.

A. Yes, I have such figures and can read the one line containing them as they appear in the document entitled: "Bituminous and Lignite Coal Tables; 1939-1940-1941. Issued by United States Department of Interior—Bituminous Coal Division—January, 1943," and in answer specifically to your question, Table 55 from that document shows that in Illinois in 1939, there was a total production of 46,000,000 tons, of which 12,000,000 tons was mined by stripping, 8,000,000 hand loaded and 26,500,000 tons machine loaded.

Q. 94. Let me interrupt you there. In strip mining, is there any travel time?

A. No.

Q. 95. In machine loading, is piece work the basis?

A. No, machine loading, by and large, is day work.

Q. 96. But hand loading, I believe, is on the piece work system, which we have heretofore been accustomed to on the face to face basis?

A. That's correct.

Q. 97. Will you proceed?

A. In Virginia, in the same year, 1939, the table shows there was no coal mined by stripping, that out of a total production of 13,500,000 tons, over 11,000,000 tons was hand loaded, leaving less than 2,500,000 tons machine loaded. In West Virginia for the same year, out of a total production listed here of 108,000,000 tons, it shows there was 592,000 tons mined by stripping, 77,000,000 tons hand [fol. 403] loaded and 30,000,000 tons machine loaded, and to make the statement complete, giving the figures for the year 1941, shows that in Illinois, out of a total production of 54,000,000 tons, approximately 14,000,000 was mined by stripping, and in excess of 33,000,000 tons machine loaded, leaving 7,000,000 tons hand loaded. In Virginia, in 1941, it shows out of a total production of 18,500,000 tons, two thousand tons plus was mined by stripping, 14,500,000 tons hand loaded, leaving something less than 4,000,000 tons machine loaded, and in West Virginia, out of a total production in 1941 of 140,000,000 tons, 1,000,000 tons was

mined by stripping, 81,600,000 tons hand loaded, leaving 57,300,000 tons machine loaded.

Q. 98. Now, when October 31st rolled around, was there again a strike among the coal miners?

A. There was.

Q. 99. About when and how did it begin and when did it become general?

A. For a matter of ten days or more prior to October 31st, there was a stoppage of work, in Alabama, in particular, and to some extent in Illinois and Indiana, and beginning the latter part of the last week in October, work stoppages began to take place throughout the area covered by this, our Association, and in the Northern Appalachian area, and by Saturday, October 30th, there was almost a complete stoppage of work, which became one hundred per cent complete on the morning of Monday, November 1st.

Q. 100. What, if anything, did the Government do then?

A. The President first issued a statement, saying that he would take no decisive action in the matter until after the [fol. 404] Policy Committee meeting of the United Mine Workers, which was called for four or four-thirty o'clock Monday afternoon. After that Policy Committee had met and still late in the afternoon or evening of November 1st, the President issued an order, seizing the mines again and placing them in charge of Secretary of the Interior Ickes.

Q. 101. I believe in this Order, Mr. Ickes was authorized to negotiate an agreement on wages and conditions with the miners?

A. The terms of the order, I believe, read that the Secretary was authorized to offer to the United Mine Workers of America a contract covering wages and working conditions for the period of Government operation.

Q. 102. Was there a provision in it to the effect that it should be in accordance with the War Labor Board's decisions in this controversy?

A. It referred specifically to the Second Illinois Agreement,—to be worked out in accordance with the provisions of the Second Illinois Agreement, and subject to the approval of the War Labor Board.

Q. 103. Was an Agreement arrived at between Mr. Ickes and the United Mine Workers?

A. Yes, on November 3rd.

Q. 104. Have you a copy of that Agreement?

A. I do have such a copy.

Q. 105.. Will you file a copy of the Agreement between Mr. Ickes and Mr. Lewis, as I note they are the sole signatories, dated November 3rd, in evidence as "Plaintiff's Exhibit No. 41"?

A. Yes.

[fol. 405] The document referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 41", and is returned as a part of this transcript.

Q. 106. Was that agreement submitted to the National War Labor Board and did the Board consider and act upon it?

A. Yes, it was submitted, and on November 5th, the Board, by resolution, acted upon it.

Q. 107. Have you in your hand a copy of the War Labor Board's resolution of November 5th, 1943?

A. I have.

Q. 108. Will you file that resolution in evidence as: "Plaintiff's Exhibit No. 41-A"?

A. Yes.

The document referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 41-A", and is returned as a part of this transcript.

Q. 109. The effect of that action of the Board was, I believe, to approve the Ickes-Lewis Agreement, with certain exceptions under two heads, namely, the provisions for payment of tonnage or piece workers, and a different application of the provisions as to pushing cars?

A. Yes, the effect of the resolution was to approve for the period of Government operation the Ickes-Lewis Agreement, with the exceptions that you have noted, and with the requirements that on those matters, particularly in reference to the payment of piece workers, the matter is to be [fol. 406] re-submitted to the War Labor Board for their approval of any clarification that was reached by the parties to the Agreement, Mr. Ickes and Mr. Lewis.

Q. 110. Up to date, has any clarification on that point gone out to the Industry.

A. No. Mr. Ickes and Mr. Lewis, however, did submit it to the Labor Board, which the War Labor Board for the last seven or eight days has had but has not yet acted on, and with which the industry is not acquainted.

Q. 111. So the industry does not know yet how to figure compensation for piece-workers under this Agreement?

A. That's right.

Q. 112. I believe the material submitted to the Board by Mr. Ickes and Mr. Lewis on this point went back to the contract of April 1, 1941, again, did it not?

A. I do not quite understand your question.

Q. 113. The suggestions that were made to the Board for arriving at the amount of compensation under that head went back to the wage rates in the contract of April 1, 1941, did they not?

By Col. Harris: I understood the witness to say that he was not familiar with——

A. I was just about to repeat that I do not know, except in a very general way, *with* all the formula is.

Q. 114. In connection with the Board's action on the Ickes-Lewis Agreement of November 3rd, did Mr. Wayne L. Morse, a member of the Board, file a dissenting opinion?

A. He did and I hold a copy of it in my hand.

Q. 115. Will you file a copy of that opinion in evidence as "Plaintiff's Exhibit No. 41-B"?

[fol. 407] A. I will.

The document referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 41-B", and is returned as a part of this transcript.

Q. 116. Under date of November 5th, did Mr. William H. Davis, Chairman of the National War Labor Board, write a letter to Mr. Ickes on this subject?

A. He did—a letter in reference to what we call the Ickes-Lewis Agreement of November 3rd.

Q. 117. Have you a copy of that letter?

A. Yes.

Q. 118. Will you file a copy of that letter in evidence as "Plaintiff's Exhibit No. 42"?

A. Yes.

The document referred to was thereupon filed, marked as: "Plaintiff's Exhibit No. 42", and is returned as a part of this transcript.

Q. 119. Now, on the matter of paragraph 13 of the Second Illinois Supplemental Agreement, which was mentioned in the Ickes-Lewis Agreement, and which has been the subject of the $40.00 portal to portal payment provided in the

Second Illinois Supplemental Agreement, did Mr. K. C. Adams, of the United Mine Workers, address a memorandum to Mr. J. D. Battle, Executive Secretary of the National Coal Association, under date of November 9th?

A. He did. I was present with Mr. Battle when the mat- [fol. 408] ter was dicussed over the phone with Mr. K. C. Adams, who was head of the Publicity Department, and head of its Official Journal, and Mr. Adams said he would send over a memorandum to Mr. Battle, containing his views on Paragraph 13, and he did send over a memorandum, of which the paper I hold in my hand is an exact copy.

Q. 120. Will you file that paper as "Plaintiff's Exhibit No. 43".

A. I will.

The document referred to was thereupon filed, marked as "Plaintiff's Exhibit No. 43", and is returned as a part of this transcript.

Q. 121. Now, upon the consummation of the Ickes-Lewis Agreement, I believe the miners returned to work and are still at work as of this date?

A. That is correct, and I would like to make this comment on the contention that the operators I represent are obligated to make the $40.00 payment agreed to by the Illinois Coal Operators. We dispute that contention and made our position known to the War Labor Board and Secretary Ickes, that we have no- recognized in any way any liability arising out of the portal to portal matter and have not made any agreement in reference thereto and do not expect that the Government either has the authority or the desire to impose any such agreement upon us while we are having tested in court the question of whether there is any liability.

Q. 122. In line with the position taken by Mr. Adams in [fol. 409] his memorandum to Mr. Battle of November 9th, do you know whether Mr. Lewis has subsequently adopted the same position in a conference with Mr. Ickes, or otherwise?

A. My knowledge on the subject would be by hearsay, as I was not present at the conference.

Q. 123. I hear no objection.

A. I have been notified that Mr. Lewis took exactly the same position before Mr. Ickes that Mr. Adams outlines

in his letter, but that Mr. Ickes, up to the present time, however, as not as yet found any way in which he could comply with that position.

Witness stands aside.

At this point, it being 12:45 o'clock P. M., an adjournment was taken until 1:45 o'clock P. M., at which time the trial of this case was resumed.

E. R. BURKE, a witness heretofore introduced on behalf of the plaintiff, being recalled, testified as follows:

Cross-examination.

By Col. Harris:

Q. 1. Senator, you had no experience in the coal business until you became President of the Southern Coal Producers Association on March 17th, 1942, did you?

A. None whatever.

Q. 2. And since March 17th, 1942, your experience has not had anything to do with the operation of coal mines?

A. Not as an operator of a coal mine, no. I have visited a [fol. 410] great many mines but I have had no experience in operating a coal mine.

Q. 3. And the wage negotiations that have been going on since early in March, 1943, are the first wage negotiations between any coal operators association and the United Mine Workers in which you have ever participated, are they not?

A. With this exception, that beginning very shortly after my assumption of those duties on March 17th, 1942, it became necessary to consider several different supplementary agreements in connection with the 1941 contract, the most notable of those being in reference to the six day work week, so that the negotiating committees on a number of occasions were in session, both the United Mine Workers and the Operators, working out these various matters, but you are entirely correct in saying that there was nothing approaching or resembling at all the negotiation of a basic wage agreement until we met in New York in March of this year.

Q. 4. Nothing that you had had anything to do with?

A. That I was connected with in any way, no, sir.

Q. 5. The United Mine Workers submitted in March, 1943, to your Association, a list of about twenty-two demands, didn't they, or twenty-four demands?

A. Whatever the number was. They were listed as twelve major demands, but in the case of one or two of them, there were a number of sub-divisions. It was in my mind nineteen, but there might have been twenty-two or twenty-four. They are all set out in that paper filed this morning.

Q. 6. Have the United Mine Workers ever filed any supplemental list, withdrawing a single one of those demands?

[fol. 411] A. I think I can say emphatically, no.

Q. 7. Did you know, before you heard Mr. O'Neill testify, that it was the policy of the United Mine Workers, when they made a demand, never to abandon it?

A. I heard that at least a hundred times in the course of our negotiations in New York, that that was the policy of the United Mine Workers.

Q. 8. And the demand that they submitted about March 10th or March 12th contained a demand for portal to portal pay, didn't it?

A. It certainly did, to the extent, at least, that I discussed this morning, yes, sir.

Q. 9. And when you said that there was a total absence of any suggestion of portal to portal pay, did you mean to imply to the Court that the United Mine Workers had abandoned their claim for portal to portal?

A. I did not mean to imply anything to the Court, but I meant to state directly and positively that the United Mine Workers at no time, in interpreting that demand and presenting it, urged or considered a real portal to portal demand, which would be a system in which the work day would begin at the portal and end at the portal, and throughout the period and until after the rejection of the First Illinois Agreement, there was never any suggestion made by any representative of the United Mine Workers for a change in the system from face to face to portal to portal.

Q. 10. The War Labor Board, in Exhibit No. 38, in its opinion of June 17th, which preceded by two months its rejection of the Illinois contract, took up the question [fol. 412] of portal to portal pay, didn't it?

A. Because it was one of the demands submitted and they took up every demand, one after the other, and acted on them.

Q. 11. And as a matter of fact, the press of the country from time to time since March, 1943, has carried articles and discussions on the portal to portal demands of the United Mine Workers, haven't they?

A. Yes, indeed, and that matter of portal to portal was discussed every day we were in conference, but I attempted to draw the distinction that it was discussed on the basis of payment for travel time, leaving the computation of wages at the face, or paying separately as such for travel time, and that was the matter that was urged day in and day out and discussed in the press, but not a real change over to the portal to portal system of computing pay.

Q. 12. I don't know whether I clearly follow you. As I gather it, you say they had a demand for wage increase and also a demand for pay for travel time?

A. In the written demands, that's correct.

Q. 13. And there were many discussions where the demanded pay or discussed pay for travel time?

A. Oh, yes, indeed. They were discussing pay for travel time right along every day on the basis of—as stated to us—that the average time in the Appalachian area, with which we are dealing, was an hour and a half and at time and a half, that would be $2.25 a day increased pay, but the point, I think, must be clear that I am making, that in all these discussions, they were not doing what the Illinois Operators did with the United Mine Workers in the Second [fol. 413] Supplemental Agreement, agreeing to change the basis to real portal to portal. That's the distinction.

Q. 14. You are making a legal distinction in the matter of construction rather than making a statement of fact. Have the Mine Workers ever abandoned the claim for travel time?

A. No, not at all. I am not making any legal distinction, not at all. What I am saying, and I repeat, is that while the demand for portal to portal as contained in the first mention of it in the United Mine Workers' demands would appear to be a demand to change from face to face to portal to portal, that that was never urged at all until the Second Illinois Supplemental Agreement was presented, but that that was included in the demand for a wage increase and only after another means was attempted to

work that out. When there couldn't be a direct wage increase then they attempted to work out some basis of pay for travel time so there would be approximately the same amount of additional wages paid, but not subject to the denouncement as strictly a wage increase, because it would be pay for travel time, which the miners, the United Mine Workers, were consistently urging, under the law, was work time. I hope no one would think that I am saying that the United Mine Workers ever abandoned or failed to emphasize their conviction that under the law, as interpreted down South in the case in which you were interested, that travel time was work time. All I am saying is that they never attempted to transfer that thing to a real portal to portal method of computing wages until they found that they couldn't, in any other way, get the wage increase they were seeking.

[fol. 414] Q. 15. This bill of complaint in this case was submitted to you and you helped draft it or went over it and approved it before it was filed?

A. That's correct.

Q. 16. I mean your petition to intervene.

A. Well, the same would be true of both petitions.

Q. 19. And in that petition, there is found this allegation: That your Association, as the bargaining representative of the mines embraced in its membership, has engaged in prolonged and repeated negotiations with said International Union of the United Mine Workers of America, and its subsidiary Districts, from time to time during the year 1943, which negotiations have failed to produce a fresh agreement owing to the opposed positions of the said International Union and the Intervener, respectively, with respect to the principal question of law arising in the present action, to-wit: the question whether within the provisions of the Fair Labor Standards Act of 1938 travel time in bituminous coal mines must be considered as work time and paid for as such. That was a true statement?

A. And is today a true statement exactly of the situation, yes, sir.

Q. 20. You were present in the City of Washington when the First Illinois Agreement was submitted and argued before the War Labor Board and heard the arguments, did you not?

A. That's correct. I listened with great interest to your argument on that day.

Q. 21. I will ask you if it is not a fact that on that day, —early in August, I think around the 4th of August, if it is not a fact in my argument on that occasion, the basis of [fol. 415] my argument was that travel time was work time, and that the miners were entitled to it as a matter of law, and as a matter of working conditions?

A. I do not recall that exactly, but I have no doubt you did make that statement, because that was exactly the position the United Mine Workers were taking, that travel time was work time, but I would also say, having listened attentively to your argument on that occasion, that I do not recall that you suggested in any way an abandonment of the face to face way of computing wages and a substituting therefor of a real portal to portal method of computing wages.

Q. 22. We had not arrived in the negotiations at that time at a statement of the contract, except the First Illinois Agreement, had we?

A. That's correct. You had not yet arrived at the point where you felt you had to change over to the other system in order to get the increase.

Q. 23. I was directing my argument to the Agreement which was then before the Board?

A. Entirely so.

Q. 24. And that, of course, is the proper way for a lawyer to argue a case?

A. Yes, sir.

Q. 25. Our appearance before the Board, leaving out any question of the Smith-Connally Bill, we appeared before the War Labor Board as soon as we succeeded in making an agreement or getting an agreement worked out with [fol. 416] an operating association and getting it signed, didn't we?

A. So far as I know, that was the first agreement made this year that was signed both by the Union and the operators.

Q. 26. Coming back to the demands that the Mine Workers submitted, did you or your Association agree to any one of those demands, whether they be twelve majors or nineteen majors and minors or twenty-four majors and minors, did you agree to any of them?

A. Do you want a specific "yes" or "no", or do you want an explanation?

Q. 27. You might say "yes" or "no", and then explain

A. If I were required to answer "yes" or "no", I would be compelled to say "No", but that would not be a complete answer unless you consider further the fact that the reason we never reached an agreement on some of these apparently minor matters, some of which were later adjudicated by the Board, was because we came to the insurmountable stumbling-block at the very inception, which was the Union's demand for a two dollar a day wage increase, which must be secured in some form, either directly or by including payment for travel time, which they argued was work time, or some other basis,—they must have two dollars, no more or less, and our equal insistence that because in the area we represented, there had been a twenty-five per cent increase since 1941, that we couldn't agree to any wage increase, so we never got beyond that point to consider these various other matters. We did talk about them. That was when I came to know John Saxton very well, was in those discussions. We would discuss the travel time proposition until we became exhausted, and then, in [fol. 417] a state of pure exhaustion, we would talk about cap lamps or some other matter for a little while. The fact that we didn't reach an agreement on any of these subsidiary demands can be understood if you understand that we were butting our heads on both sides against a rock that didn't yield.

Q. 28. You did get to the point that you discussed travel time, didn't you?

A. We did discuss travel time and how it should be paid for, day after day, yes, sir, but we never discussed, to the best of my recollection, never discussed for one moment a change of the system of computing pay to put it on the portal to portal basis.

Q. 29. But when they were talking about wanting pay for travel time, you and your Association took a position that you were opposed to paying for travel time at all?

A. We took this position: We said, in the first place, that travel time was one of the incidents of work in the bituminous mines, and through a long period of collective bargaining, efforts, sanctioned by the Fair Labor Standards Act, it was determined that the most satisfactory way of computing pay was to make it on the face to face time, with whatever proper consideration should be given to average travel time, based on these rates, and we said

that due to the fact that Col. Crampton Harris was able to get the District Court and the Fifth Circuit Court to agree with him that travel time in the ore mines must, under the Labor Standards Act, and under the Administrative Rulings on that, be considered work time, that didn't affect us because we thought not that conditions in the mines were different but that the above ground conditions were very different; that in this industry we had had fifty years of [fol. 418] collective bargaining, culminating in an agreement which had been approved by the Wage and Hour Division, that face to face was the proper method, so while we listened to their arguments that average travel time was an hour and a half in the Appalachian area and ought to be paid for at the basic rates because it was over seven hours, we never agreed to that at all.

Question No. 29, as reported, was thereupon read, by request.

A. Yes, that was our position then and our position now.

Q. 30. And you have done everything in your power, from the time that matter first came up to the present moment to prevent any agreement being reached and put into effect by anybody that would give the coal miners pay for travel time, haven't you?

A. To any other extent than it is paid for in the present rates, the answer is "Yes", and I hope to continue those efforts.

Q. 31. And when the United Mine Workers and the Illinois Coal Operators came to the second Agreement, and it was pending before the War Labor Board, you went to the War Labor Board, did you not, and had them to have a hearing so that you could oppose the approval of that agreement?

A. The answer to that is "Yes", and if you will permit me, I would like to explain that; When the Second Illinois Supplemental Agreement was reached, Mr. Campbell, the President of the Illinois Operators Association, announced they were submitting this agreement to the War Labor Board for approval, with the idea that it would become the basic agreement for the entire industry and [fol. 419] Mr. Lewis, the President of the Union, made a public statement to the same effect, that when the War Labor Board had approved that agreement, it was going to be the basic agreement for the entire industry, and we

didn't want it to be the basic agreement for the entire industry, and have done—

Q. 32. I believe you have misquoted him. Didn't Mr. Lewis say he hoped it would be a pattern for the industry?

A. I accept your statement. We had no objection to the Illinois Operators making an agreement on any basis they wanted to with the United Mine Workers, if it could be confined to the signing parties, but we know, from the statements the parties made, and from the whole history of wage negotiations, once an agreement is made in one area, then by economic and other methods, including the strike weapon, which is of such potency, that once an agreement is made with a single operator, there is no means of preventing it from becoming recognized in application to the entire industry, and as I say, we didn't want to be a party to what Mr. O'Neill described as this destructive move on the part of the Union, and we don't want to be now, and we are going to resist it to the utmost of our power.

Q. 33. As a matter of fact, you made a public statement in substance to this effect, did you not, that if the War Labor Board approved the Illinois Agreement, your Association would not be bound by it?

A. I don't recall such a statement, but I would say if I didn't make a statement of exactly that nature, I would make one very similar to it, not quite in that language, to the effect that whatever agreement may be approved in [fol. 420] Illinois, we will resist its application to the utmost of our power in the Southern Area, with all legal means available to us.

Q. 34. Legal means or other means?

A. We do not have available on our side anything comparable to the strike method which you use so freely on your side.

Q. 35. As a result of your request, the War Labor Board granted a hearing and you appeared and argued in opposition to the approval of the Second Illinois Supplemental Agreement?

A. Yes, sir.

Q. 36. And when the Secretary of the Interior and the United Mine Workers attempted to make an agreement in line with the War Labor Board's ruling, you went to the War Labor Board and told them that you were opposed to it, didn't you, since the agreement of November 3rd, the Ickes-Lewis Agreement?

A. No, I haven't talked to any member of the Board since that Agreement, but if I had talked to them, I would certainly have said what you say, and I think some operators have done so, but I have not.

Q. 37. The reason I asked you, I probably misunderstood you on your examination, that you made it known to the War Labor Board,—your testimony, as I got it, and to Mr. Lewis, that you wouldn't consider that the $40.00 payment had any application to you?

A. I thought you were talking about the agreement as a whole. No, while I have not talked to any members of the War Labor Board at all about the matter, I did write to Mr. Davis, and I wrote to Secretary Ickes, and I will be glad to furnish you a copy of the letter which I have here, in [fol. 421] which I attempted to refute this argument presented by K. C. Adams, that there was any obligation at least outside of Illinois to pay forty dollars or any other sum in settlement of an alleged liability which we deny, and I hope that as a result of my appearance in these two matters, by the sending of those letters, that we have that definitely out of the picture so far as any order from Mr. Davis or Mr. Ickes is concerned. What the parties may do by agreement among themselves, I don't know.

By Col. Harris: Of course, I would be glad to get any information I could without being called upon to put it in evidence.

A. I venture to say that you will agree entirely with me that under the order authorizing the Secretary of the Interior to take charge of the mines, that there is not a scintilla of authority in Mr. Ickes to compel the operator to recognize an alleged liability for a period expiring on June 20th, by its terms, many months before this particular seizure to which they refer took place.

Q. 38. Now, then, you testified that there was an order directing the return to work on June 7th, but I notice that counsel on the other side did not offer any order directing a return to work about June 7th. May I inquire of you or counsel whether they have such an order?

A. I thought there was an order by Mr. Lewis, speaking for the Policy Committee, about that time, directing a return to work. If there is, it should be produced. If it isn't, the statement should be stricken.

By Col. Harris: May I inquire if counsel produced it and I omitted it?

[fol. 422] By Mr. Stuart: We did not produce any order from Mr. Lewis, directing a return as of that date, but it is my understanding such instruction was given.

A. I think it would be safe to say that if the men went back to work about that time, it was on order from Mr. Lewis, because I haven't known of them going back without an order.

Q. 39. In view of that statement, I will ask you if you are familiar with this communication from the Secretary of the Interior to Mr. Lewis?

A. Yes, I have in my book a copy of that and Mr. Lewis' order following it.

Q. 40. You will notice that says: "My Dear Mr. Lewis: As operator of the coal mines on behalf of the United States Government, I expect that you will direct the members of the United Mine Workers of America to return to work on Monday, June 7th. Sincerely yours, Harold L. Ickes, Secretary of Interior". Are you familiar with this reply of Mr. Lewis', dated the same day, June 4, 1943?

A. Yes.

Q. 41. Which is to this effect: "Hon. Harold L. Ickes, Secretary of Interior, Washington, D. C. My Dear Mr. Secretary: I have your letter of June 4th. I have no power to direct. I shall, however, recommend to the Policy Committee of the United Mine Workers of America that it direct the Mine Workers to return to work on June 7th. Sincerely yours, John L. Lewis".

A. That's right, and that's the letter to which we were referring. It was the fact that you referred to it as a June 7th letter that got me confused. It was dated June 4th, di-

[fol. 423] recting them to return to work on June 7th.

Q. 42. In your direct testimony, you referred to the Order of the president. Have you in your files the text of the direction of President Roosevelt to Secretary Ickes, along in October, where he directed Mr. Ickes to offer an agreement of some sort to the United Mine Workers?

A. Yes.

Q. 43. There was some talk of it on your direct examination but that wasn't put in evidence.

A. We would be glad to put it in. I doubt if they have

a copy of it but the official copy is here and copies can be made of it, or of any part you may want.

By the Court: Is there any objection?

By Mr. Stuart: No objection.

By the Court: Let it be stipulated that a copy will be filed in evidence and a copy furnished to counsel.

The document referred to was later filed, marked as:

"Plaintiff's Exhibit No. 44", and is returned as a part of this transcript.

Q. 44. Do you have in your files a statement of the president of the United States, with reference to ordering people under a contract, wherein he stated, in substance, that no man had the right to dictate the contracts of other men?

A. I recall the statement to which I know you are referring, whether that is the exact language or not, it is certainly the substance of it. I know that I have that statement, but I doubt whether it is in this book. I will be very [fol. 424] glad to get it and bring it back with me from Washington when I come.

Witness stands aside.

The Plaintiff Here Rested.

And, thereupon, Court adjourned until Monday, the 22nd day of November, 1943, at 10:00 o'clock A. M., at which time the trial of this case was resumed.

AGREEMENT RE ESTIMATED PROPORTION OF LABOR COST

By Mr. Richardson: An apparent inconsistency between the estimated proportion of labor cost in the total production cost at the Jewell Ridge Mines has developed between the testimony of Dr. St. Clair and Mr. Hagy. Dr. St. Clair has stated that the direct labor cost amounts to approximately two-thirds of the overall production cost. Mr. Hagy stated that the direct labor cost amounted to approximately eighty per cent, having in mind the producing cost of which he had a record at the mine; but not including certain items of administrative and other expenses and overhead. It is agreed that the estimate of two-thirds made by Dr. St. Clair is accurate when all of the items of producing cost are considered.

[fol. 425] And, thereupon, the defendants, to maintain the issues on their behalf, introduced the following evidence, to-wit:

PERCY TETLOW, a witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Col. Harris:

Q. 1. What is your name, please sir?

A. Percy Tetlow.

Q. 2. Major Tetlow, when did you first enter upon the business of mining coal?

A. December 16th, 1887.

Q. 3. How old were you when you went into the coal mines, Major Tetlow?

A. That was my twelfth birthday.

Q. 4. What work was there for a child to do in the coal mines?

A. Well, there was—it was customary in that day for boys of twelve to enter into the mining of coal. They may work at—as a trap-door attendant; they may work with the miner to learn the mining of coal—I worked with a miner and learned the duties of mining.

Q. 5. How long did you work under another miner learning the duties of mining?

A. About a year.

Q. 6. And in those days, as a helper, learning how to mine, how were the miners paid—how were you paid?

A. I was paid the wages that would be earned by one [fol. 426] mine car of coal.

Q. 7. What were those wages?

A. Well, at this particular mine, I would say about forty cents a day.

Q. 8. And then after a year, or approximately a year, learning how to mine, what did you do?

A. Well, I performed all the services that a regular miner would perform, mining coal—that is, undercutting it with hand-picks, which was the method in that day, the drilling of holes, shooting of coal, loading of it, dumping, track laying in the working face.

Q. 9. Did the boys of thirteen use the same size tools that the grown man did?

A. No, they would generally have lighter-weight picks and smaller shovels, but using all the other tools that a miner would use.

Q. 10. Did you have a task basis in those days?

A. That was customary in those days, in each particular mine that I worked in, the task base of so many cars per day, per shift.

Q. 11. In those days, how many hours per day did miners stay underground on an average?

A. Well, it would vary at mines. At the mines I worked in, I would say the average would be about ten to eleven hours a day.

Q. 12. In the winter time, did that mean that you, as a coal miner, while you were a boy, never got to see the light of day except on Sundays?

[fol. 427] A. That was the general rule, because you would be at work long before daylight in the winter time and it would be dark when the day's work was over.

Q. 13. Did you continue to work in the coal mines until the United Mine Workers of America was organized?

A. I did.

Q. 14. When was the United Mine Workers of America organized, approximately?

A. It was organized in January, 1890.

Q. 15. Did you join?

A. I did.

Q. 16. Have you been a member continuously of that Union from 1890 up to the present time?

A. I have.

Q. 17. Have you held any official positions with the United Mine Workers of America, and if so, what positions have you held?

A. Well, I have held many positions.

Q. 18. Would you start chronologically and trace the positions you have held, Major?

A. My first official position was President of a subdivision of the Ohio District. In 1900, I was elected President of that District. I held that office for eight or nine years and the sub-district presidents were members of the Executive Board of the Ohio District. I later became an official in the International Union and held positions with it up until the outbreak of the first World War. I held the position of Statistician and Research Director for the Union, and since that time, I have held a number of positions. [fol. 428] I have acted in the capacity of president of a number of districts and also as Technical Advisor to the President of the International Union.

Q. 19. You speak of districts. Will you explain to the Court how the United Mine Workers of America is organized with reference to locals, districts and the International?

A. The membership of the Union is organized into Local Unions. Local Unions generally have a Local Union at each mine. We have a few instances where there is two or three small mines organized into one local union, and some of our—the next sub-division is sub-districts, which is in many of our districts, the District organization and then the International Union. The Districts are generally not governed by state lines but by producing districts. In Pennsylvania, we have four bituminous districts and three anthracite districts. In West Virginia, we have three districts and some of the miners in the Panhandle belong to the Ohio District, and some in the northeastern counties belong to the Maryland District. Then some of our districts take in a whole state, like Illinois, Iowa, Indiana.

Q. 20. You spoke of a period up to the World War. Did you lose some time from the coal mining business during the Spanish-American War?

A. Yes, I was in the service.

Q. 21. About how many months did you lose from the mining business during the Spanish-American War?

A. I volunteered at the outbreak of the War and I was mustered out on the 28th of December, so I presume about nine months.

Q. 22. And how much time were you out of the mining [fol. 429] business and in the business of war during World War No. 1?

A. I went in in April, 1917, and I was mustered out in April, 1919, just a few days over two years.

Q. 23. Now, you had got up to the point where you were Statistician for the United Mine Workers, International Union. I will ask you whether or not you have held any public office, either State or Federal, in which you were connected with the coal mining industry?

A. Yes, I served as Director of Industrial Relations in Ohio in 1921 and '22, and I had under my direction the mining department and supervision of the inspection force and I was a member of the Bituminous Coal Commission, Federal Commission appointed by the President in 1935, and served as a member of that Commission, the first Com-

mission, and the second Commission of 1937, which continued right through, as the Employe Member of the Commission, and I was Chairman of the Commission during its last year, in 1939, when the Commission was abolished by an Executive Order of the President, and then I stayed with the Interior Department as a Technical Adviser to the Secretary of the Interior and the Director of the Coal Division. I remained there until the minimum prices were made effective on October 1, 1940.

Q. 24. Major, have you, leaving out of account the time you were overseas during World War No. 1, have you been in Europe at any time studying the coal mining business or making any inspections or examinations or familiarizing yourself with the coal mining industry abroad?

A. I have. I have visited most of the mines in Europe [fol. 430] and in the British Isle. I have been a delegate to Mining Congresses and had a chance to study mining in all the countries of Europe.

Q. 25. Major Tetlow, do you know of any civilized country except the United States of America, in which coal miners are not paid on a portal to portal basis?

A. All of the countries of Europe and in Great Britain, the miners have been paid on a portal to portal basis, and including what they call "winding time". Winding time is the shaft time of lowering and hoisting men in many of the deep shafts. I don't know what has happened since the War in Continental Europe, but up until the outbreak of the recent war, in all those countries, the miners were working on what is known as a "bank to bank" or "portal to portal" basis. What has happened since that, I can't say.

Q. 26. Are you familiar with the Constitution of the International Union, United Mine Workers of America, adopted at Cincinnati, Ohio, on November 1, 1942?

A. I am.

Q. 27. I call your attention, Major, to Article Two of the Constitution entitled "Objects", and to the Paragraph designated "Third", which reads as follows: "Third: To demand that not more than six hours from bank to bank in each twenty-four hours and not more than five days per week shall be worked by members of our organization". Could you say approximately how many years that has

been in the Constitution of the International Union, United Mine Workers of America?

A. That provision has been in the Constitution a great [fol. 431] number of years. I couldn't say the exact year that that provision was first placed in the Constitution, but I feel quite sure for over twenty years.

By Col. Harris: We offer, if the Court please, the paragraph designated from the Constitution, as our Exhibit A.

The paragraph from the document referred was thereupon filed, marked as:

"Defendants' Exhibit A", and is returned as a part of this transcript.

By Col. Harris: I might state that some of the older Constitutions will arrive during the day, and I will put them in by another witness.

Q. 28. Does the phrase "bank to bank", Major Tetlow, have the same general meaning as "portal to portal"?

A. It means the same.

Q. 29. In your work as a miner, have you become familiar with the various terms used in the mining industry generally in this country?

A. I have.

Q. 30. What is meant, Major, by "yardage" and "dead work"?

A. Well, the mining of coal is generally upon a tonnage basis, and the miners paid on a tonnage rate for performing all the services incident to the mining of coal. In some mining districts, instead of using tonnage as a base for payment, tonnage rates, they have paid by measurement, so much a yard for mining the coal. That came about as a result of possible questions arising from impurities in the coal, where miners demanded payment for removing impurities, and in order to remove that question, they were [fol. 432] put upon a yardage basis, generally on the basis of twenty-seven cubic feet per ton, to relate yardage with tonnage methods. And then yardage has been paid, in addition to the tonnage rate, for removing slate bands or impurities in the coal. You may have a band of slate, a parting in the coal of different thicknesses, and the miners and operators would agree upon a yardage rate for removing that rock or slate or impurities. That would be in

addition to the tonnage rate, because the impurities displaced coal in the seam, and naturally, there would be more services performed in producing a ton of coal with impurities in it than you would if there were no impurities. The yardage rate was based upon these principles. Dead work is work that a miner performs other than his regular services in mining coal. He may have a fall of slate in his working place, removed from the face,—generally, the working face is defined in most of our districts and by the law as fifteen feet from the working face. He may have a fall of rock; he may be required to remove that. That blocks the roadway. He removes it. It may take fifteen, twenty or thirty minutes or an hour and he is paid on a time basis for that. That's what we call dead work. Dead work is labor performed by the miner other than his regular services in his working place.

Q. 31. You spoke of impurities, slate or other impurities separating the vein of coal. What about the top of the vein where you shoot down rock? What do you call it, or what designation is it for shooting down the slate above the seam of coal?

A. That's called yardage, slate yardage. In many of our mines, it is of varying thicknesses. In the thin seams it is required to shoot the slate over the coal to get height [fol. 433] enough for haulage or for height in the rooms to permit motors or mules or horses to gather the coal, so they shoot down slate or rock above the coal and sometimes they shoot the fireclay underneath the coal, depending upon whether a place is rising or pitching, and that is called yardage, and there has always been a rate for that in mining as long as I can remember, and that rate is based upon so much per inch per lineal yard. That's yardage.

Q. 32. Now, Major, in mining coal, when the coal miner has arrived at or near the face of the coal at the beginning of a shift, can he ordinarily start immediately in the production of coal?

A. It all depends upon what the circumstances were at the end of the preceding shift and what method of mining, whether it was—the coal was undercut with a mining machine, whether it was cut by hand or whether the coal was loaded by hand or loaded by machines.

Q. 33. Let's take these particular mines in which the coal is undercut by machines but it is loaded by hand. Take a

mine of that sort. What would the coal miner normally and ordinarily do at the beginning of his shift after he arrived at the working place?

A. Well, if he had cleaned out, loaded out all the loose coal in the preceding shift, and the machine men should cut the coal, cut the place on the off-shift at night, which many mines do have that system, when he went into his working place in the morning, his place would be undercut, undercut to a depth varying depending upon the length of the cutter-bar of the machine, maybe six, seven, eight or nine feet in depth and the kerf or cutting may be four to six [fol. 434] inches in height. The fine coal that had been cut by the machine,—this machine cuts the coal very fine, the bits cut it out, bits on a chain, cut the coal very fine and the miners' term for that is "bug dust". He would have in a normal place of say twenty-four feet wide, and if it was six inches in height and six feet deep, or nine feet deep, he would have anywhere from maybe two to three tons of this fine coal laying at the face, and some of it in the cuttings, dependent upon the width of the place and the depth of the cut.

By the Court:

Q. 34. Did I understand you to say that the cut itself was six inches in depth?

A. Four to six inches, sir. The cutter-bar would vary so if you had a seam of coal four feet thick, you would have three feet and a half of coal to shoot down and he would find that place cut. Well, now, what he may do first, he may first want to lay track. If the machine men had been in and removed the track at the face, which they are required to do, he may lay down his temporary track, fifteen feet of it, because when these machine men pull in to cut with their cutting machine, they pull in on the track, it's a self-conveyor cutter and in some places they have truck-mounted machines that cut from the truck, but if it's an ordinary shortwall cutting machine, they unload it and start the cut and it's on the floor and when they come to the track, they have to remove the track, it may be in the center of the working place, to cut across, and the miner may have to lay that track the first thing, and, then he, dependent upon what the methods are at the mines,—many companies require that this bug-dust be loaded out along

[fol. 435] with the coal, some allow them to load it separately. Where they can load it separately, they load this bug-dust and get it out of the way so they can shoot the coal free. Then they are required to drill their holes. In an ordinary place, the miner drills three to four holes in a cutting. If they are allowed to shoot in the day time as most mines do, they shoot the coal down and are ready to load. They are required to set the timbers in place. About one of the first things a practical miner would do would be to test the roof and see if any conditions have changed as a result of the elapsed time from the former shift. He may have left the place in perfect condition, the roof sound and well-timbered, and come back in the morning and find a break in the roof, bad top and slate hanging there, and have to timber it before he starts to work. That's about the first thing a miner would be required to do in min-g, test his working place and see that it is safe and he is required to do that timbering and most of the state laws requires a miner to timber fifteen feet from the working place and keep that safe and those are the duties a miner would be required to do in the morning when we went to work.

By Col. Harris:

Q. 35. I don't know whether the slice that's taken out from underneath the coal is clear in the record. As I understand, this machine will cut a stratum or slice from four to six inches thick at the bottom of the coal seam, back in the coal a depth of six, seven, eight or nine feet: is that correct?

A. That's right.

Q. 36. And in cutting, they will, the bits will bring part of that dust out on the floor of the room. Is any of the [fol. 436] dust left up under the coal so that the miner has to get that out with a shovel?

A. Oh, yes, bound to be a certain amount of it left in there.

Q. 37. And I believe you figured that a strip six inches thick, six feet deep, in a room twenty-four feet wide, would amount to approximately two and two-thirds tons of coal, allowing twenty-seven cubic feet to the ton?

A. Yes, whatever the cubic measurements may be, based upon twenty-seven cubic feet to the ton. That's easily

ascertained, if you know the width of the working place.

Q. 38. Major, the miner, in practically all mines, spends more time in his room at his working place than he does in any other part of the mine, doesn't he?

A. Oh, yes. Yes, ordinarily, he is not permitted to run around the mine out of his working place. When he enters it in the morning, he is there until quitting time, as a rule.

Q. 39. Now, then, in your work, both as a miner and connected with the United Mine Workers of America, and as an official, Government and State, dealing with coal mines, have you had occasion to become familiar with the hazards of coal mining with reference to the travel ways or passage ways, main entries, as compared with the rooms in which the miners work?

A. Yes.

Q. 40. Are the conditions in the main entries along which the men walk or are transported and along the other passage ways after they leave the main entries until they get to their rooms, such that accidents are frequent or infrequent?

[fol. 437] A. Frequently, I would say.

By Mr. Richardson: If the Court please, we should like to interpose an objection to the inquiries as to hazards, upon the ground that they are immaterial to the issues here involved.

By the Court: They may have some bearing. I will overrule the objection. Exception may be noted.

Q. 41. Major, in the coal mining industry, are records kept by the United States Government of accidents in mines?

A. Yes, the Bureau of Mines compiles a record of accidents and they are compiled from reports made to the Bureau of Mines and also to the State Mining Departments of the respective states.

Q. 42. Do those records deal with all injuries in mines or merely with compensable injuries?

A. The accident reports to the different states and to the Federal Government, which the Federal Government compiles, is largely the accidents that are so-called compensable accidents, for which compensation is paid, where the workman loses one week or more of his work as a result of the accident.

By Mr. Richardson: If your Honor please, I shouldn't of course, wish to interrupt unnecessarily, but may I understand that to the line of questions along a subject as to which an objection has been interposed, that objection will be applicable throughout?

By the Court: That has been so far the procedure and it may be understood that your objection goes to all the interrogation of this witness along this line.

Q. 43. Have you the Government figures showing the number of fatal accidents in the coal mines of America in the year 1941?

[fol. 438] A. I do not have the Bureau of Mines Report as such, but I have the figures, sir.

Q. 44. Would you give us those figures, please, sir.

A. The Bureau of Mines Report for 1941, Total Fatal and Non-Fatal Accidents, Bituminous Coal Industry—Fatal Accidents: 1075. There were 66 accidents which resulted in permanent total disability; there was 1960 permanent partial accident-, and there was temporary injuries of 44,641, making a total of 47,742.

Q. 45. Approximately how many men, in your judgment, were employed in that industry during that year?

A. In 1941, approximately 450,000, I will say.

Q. 46. So that those figures show that during the year one man out of every ten or slightly in excess of one man ought of every ten was injured in the coal mines of America?

A. Yes. I am sure that the average would be about one to ten. I know the Bureau of Mines has not completed its 1942 report. In 1942, we had about 66,000,000 tons increased production over 1941, so at that ratio of increased production, increased exposure, it would be fair to state that the accidents in 1942 would be approximately the same percentage of increase in accidents as increased production, because you had increased exposure, and the records, accident records show that based upon exposure, time exposure, and the ratio of accidents run pretty uniformly throughout the years. You can't determine the ratio by tons produced, because increased productivity changes that increase per capita, and increased production generally is the result of mechanization, so the only way to determine that is on the basis of exposure.

[fol. 439] Q. 47. When does the exposure start, when the miner enters the mine or when he arrives at his working place?

A. When he enters the mine.

Q. 48. What hazards is he subject to when he enters the mine and before he reaches his working place?

A. Well, if it is a shaft mine, where men are lowered—

Q. 49. Let's leave out the shaft mine and consider,—I believe you call this a drift mine, where they go in on the horizontal, with the seam of coal running up hill and down dale some what.

A. Well, the hazards of mining are such that when you enter a mine, you naturally meet the hazards that may occur in entering a mine, whether you walk in or drive in on a haulage trip. If you are going in on a haulage trip, you have the normal hazards that apply to haulage underground. Walking, you have that, and in some mines you have a greater hazard than others. If a seam of coal is thin and men are required to travel on traveling routes in which there is motor yards on which motors and haulage is used, that exposed wire would be possibly at a height that a man could contact it with his head and body, and you would have a greater hazard in a thin seam where you were going where there was exposed wires than you would in a thick seam. You have always got those hazards. You have the same hazard from traveling on a haulway from bad roof, falling roof, where timbering has been neglected. You have the hazard of being killed by falling slate or rock the same as you would at the face of the coal. Ordinarily, you have more falls of rock on haulage and traveling roads than you do at the face of the coal. The only question is when men are traveling, they may be traveling under the particular rock that falls. When you [fol. 440] are at the face, you are in that confined area and you naturally get injured from that fall of rock more so than you would on the traveling road, but I think all the State Mining Reports and Government Reports break down those accidents as to the nature of them and the place where they occurred, whether at the face of the coal or on the haulage way or room, or explosions from gas or coal dust of whether it is the result of handling explosives or whether it is the result of falls of slate, or what not. Those accidents are broken down. I do not have them with me.

Q. 50. Is the hazard an ever-present hazard to the men

in the mines from the time they enter until the time they come out of the mines?

A. Yes, that's true. It must be so. Understand, a man traveling in the mine in the dark, even though he has the most modern electric light, his range of vision is narrowed, he can only see a few feet, he is always in danger of falling or tripping over ties or over the traveling road, and the danger from falling and being injured, and not being able to see the danger. The average man traveling along a haulway or traveling road, he can only see a short distance, as his head is hung down if it is a low place, and he is required to crouch, he can't see the roof, he is watching the travel road to see that he don't stumble or fall. A man can be injured going in the mine if there happens to be an explosion in the mine, he can be injured there as readily as he would in any other section of the mine. And a lot of these haulage roads, which are travel roads, many of them, you have a constant difficulty of keeping clearance along these haulage roads or travel roads so workmen going in and out while the haulage is under way, motors [fol. 441] running in and out, for clearance or man-holes, where they can step in in safety while the trips are passing, and we have many accidents of that nature.

Q. 51. You have many accidents, do you not, where the man-trips are wrecked?

A. Well, there is accidents occur from trips being wrecked. As I said, you have always that hazard of transportation. Transportation underground and transportation outside is two different things.

Q. 52. You mean transportation underground is more dangerous?

A. That's right. You take hauling a man-trip or a motorman hauling coal, he passes over that road many times a day on that haulage road. As he is going in with a trip, by the time he comes out, there may be a timber broken down with the weight of rock, and it falls on the haulage road and this man comes out, and if he is going at a normal speed and there is a fall of slate, he may not get his motor stopped and trip stopped, and he runs into it and gets killed or injured. There is always these hazards in mining which endangers transportation different from what you find outside, because most of the disrupting danger comes from the falling rock that falls on the travel roads.

Q. 53. Major, in your work with the United Mine Workers of America, have you participated in wage conferences or wage negotiations?

A. Yes, I have, since 1900.

Q. 54. How are the demands which the Union makes upon entering a wage conference arrived at by the Union? Who determines—what I mean to ask is this,—who determines [fol. 442] what demands will be submitted to a wage conference?

A. The legislative body of the Union, of course, is its conventions. The conventions are composed of representatives from each of our Local Unions, based upon the membership of the Local Union, and the delegates to these conventions formulate its laws and its policies. They adopt wage scale proposals and from these actions and resolutions adopted in the convention spring the proposals that are submitted to the coal operators in the wage negotiations. In the last convention, the last two or three conventions, the organization, that is, through the delegated authority, have created a Policy Committee, composed of the International Officers, District Officers and men elected directly from the mines which compose a Policy Committee with authority to negotiate and to consummate agreements, and that's the normal process in collective bargaining in the coal industry for the Miners' Union.

Q. 55. Are those demands usually submitted to the operators in writing or orally?

A. In writing.

By Col. Harris: I am not sure whether the gentlemen on the other side put in the wage demand of the 1943 negotions or not.

By Mr. Richardson: No, sir.

Q. 56. Major, before I go into the details of these conferences, will you state to the Court just what your official connection with the conferences was?

A. As a member of the Negotiating Committee and also [fol. 443] Chairman of the Negotiating Committing for the Southern Wage Conference group.

Q. 57. You mean Chairman of the Committee from the standpoint of the Miners?

A. That's right, sir.

Q. 58. And was that the group in which the mines located in this part of Virginia, including the mines in quesyion,

those of the Jewell Ridge Coal Corporation, Jewell Ridge and Jewell Valley, are they in the Districts covered by that Conference?

A. By the Southern Wage Conference.

Q. 59. Now, I show you a paper, Wage Scale Proposals for the Bituminous Coal Industry, adopted by the International Policy Committee of the United Mine Workers of America, New York, New York, March 9th, 1943. You are familiar with that document, are you not?

A. I am.

Q. 60. Is that the wage demand which the United Mine Workers submitted to the operators in New York, in March, 1943?

A. That's right.

By Colonel Harris: We offer this as Exhibit B.

The document referred to was thereupon filed, marked as: "Defendants' Exhibit B", and is returned as a part of this transcript.

Q. 61. Major, as an expert in the coal business, without going into all the elaborate ramifications, but as a summary, was it your understanding that the United Mines Workers of America were demanding a wage increase of $2.00 per [fol. 444] day, and in addition to that, pay for travel time?

A. Certainly not.

Q. 62. Has the position of the Mine Workers with reference to their demands been accurately presented so far as you know, in public declaration by any Governmental agency or by any Operators Association?

A. I will say it has been very confusing.

Q. 63. You said, I believe, that from the standpoint of the United Mine Workers you were in charge of the Negotiating Committee with the southern coal producers. Did you continue to be in charge as long as you were in negotiation?

A. Yes, sir.

Q. 64. And have you kept familiar with the various proceedings before the War Labor Board?

A. Yes, sir.

Q. 65. During the present year?

A. Yes, sir.

Q. 66. There was introduced an opinion by the War Labor Board, dated October 29th, 1943. I am under the impression and I inquire of the gentlemen on the other side,—I am

under the impression that you gentlemen did not introduce the dissenting opinion of the A. F. of L. members of the Board. Am I correct in that?

By Mr. Stuart: Which is that you are talking about?

By Col. Harris: October 29th.

By Mr. Richardson: Couldn't we determine that more accurately by looking at the exhibit and seeing what it con-
[fol. 445] sists of?

By Mr. Stuart: We didn't introduce any decision of October 29th. We did of October 26th, which is the decision of the Board on the Illinois Second Supplemental Agreement.

By Col. Harris: Here is the document to which I refer.

By Mr. Stuart: Plaintiff's Exhibit No. 40-A is dated October 26th, 1943, and is the decision of the National War Labor Board in the matter of Illinois Coal Operators Association and United Mine Workers of America. That shows that a dissenting opinion was filed by the American Federation of Labor Members. Yes, that's in.

By Col. Harris:

Q. 67. Major, in your work in the coal industry, have you become acquainted with Mr. Charles O'Neill, an official of the Central Coal Producers Association?

A. Yes.

Q. 68. How long have you known him?

A. Thirty or thirty-five years.

Q. 69. Has Mr. O'Neill, as the representative of that Association, met with you and other officials of the United Mine Workers of America in wage negotiations during the year 1943?

A. Yes, sir.

Q. 70. Did the Association of which Mr. O'Neill is President, submit to the United Mine Workers a proposed form of agreement on June 14, 1943, recognizing and paying for travel time?

A. He did.

By Mr. Richardson: If your Honor please, as to what the agreement recognized and provided, that would be determined best by the agreement itself.

[fol. 446] By the Court: I think that comment is sound and it is so considered.

Q. 71. Major, I hand you a document dated June 14, 1943, headed Washington, D. C., marked "Supplemental Agreement", and will ask you to examine that and state whether that is the agreement or proposed agreement which was submitted by Mr. Charles O'Neill on or about June 14, 1943, to the United Mine Workers of America, in wage negotiations in the city of Washington, D. C.

A. Mr. O'Neill and other representatives of the Central Pennsylvania Coal Producers Association met with the conferees of the United Mine Workers and were endeavoring to reach an agreement for the Central Pennsylvania Coal Producers Association, and at this time, Mr. O'Neill and his Association had withdrawn from the Appalachian Conference and sought to make an agreement with the Union and on June 14th, 1943, Mr. O'Neill, as spokesman for his group, representing the Central Pennsylvania Coal Producers Association, did make this proposal.

By Col. Harris: We offer that proposal in evidence, if the Court pleases, and I desire to call the attention of the Court to this language, without reading all of it.

Col. Harris thereupon read paragraph 1 of the offered document.

By the Court: Is there objection, gentlemen?

By Mr. Richardson: Yes, sir.

By the Court: Let it be admitted, under the same conditions as the other documents.

Q. 72. Major, are these wage negotiations, in which I believe you have said you have participated since 1900, are they matters which are ordinarily quickly concluded or do the negotiations last for days or weeks or months?

[fol. 447] A. In recent years, since 1933, these negotiations have been very extended and lasted for months.

Q. 73. In all your experience since 1900, in these wage negotiations, has there ever been a time in any wage negotiation when the coal operators agreed to the demands submitted by the Union when those demands were first submitted?

A. Never.

Q. 74. Did you, subsequent to June 14th, 1943, appear as a representative of the International Union, United Mine Workers of America, with or before the Secretary of the Interior, Mr. Ickes, during the month of November in a conference with the operators? That is, during the present

month, did you appear before the Secretary of the Interior?

A. I have.

Q. 75. Did you also appear before the War Labor Board in their last hearing on the Illinois contracts, the second supplemental agreement? To refresh your recollection, that was the hearing in which——

A. The public hearing?

Q. 76. The public hearing in which you and I appeared?

A. Yes, sir.

Q. 77. Now, the various orders of the War Labor Board on the Ickes-Lewis Agreement of November 3rd have been put in evidence, but as I understand it, there was a letter of re-submission and clarification from Secretary Ickes to the War Labor Board?

A. Yes, there was.

Q. 78. Have you a copy of that letter of clarification? If [fol. 448] the Court will excuse me, I will go back. I overlooked one instrument I have here.

At this point, a recess for the period of ten minutes was taken.

By Col. Harris:

Q. 79. Major Tetlow, I got ahead of myself on my documents a moment ago and was about to overlook the next exhibit I had in mind. Major, during the month of September, 1943, did you participate in wage conferences in the city of Washington, representing the United Mine Workers of America, with conferees representing the Appalachian General Conference?

A. I did.

Q. 80. Was Mr. Charles O'Neill a member of that conference?

A. Yes, sir, he was.

Q. 81. Now, tell the Court, please, who constituted the Appalachian General Conference, or Joint Conference, from the standpoint of the operators?

A. The Appalachian Joint Conference is composed of Operators Associations and Operators from Ohio, Michigan, the Panhandle District of West Virginia, Northern West Virginia, and the bituminous districts of Pennsylvania and Maryland.

Q. 82. Were those conferences going on at the time that the Illinois Operators were in Washington negotiating or

waiting to negotiate the Second Supplemental Agreement, dated the 23rd day of September, 1943?

A. They were. They were running concurrently.

Q. 83. And I will ask you to tell whether or not the conferees for the operators, represented by Mr. Charles O'Neill, submitted to you and your colleagues representing [fol. 449] the United Mine Workers of America a proposed form of contract dated or marked "Fourth Draft—September 12, 1943"?

A. After the Central Pennsylvania Coal Producers Association had submitted their proposal, the Appalachian Operators Group was re-constituted, in which Mr. O'Neill joined with the other coal operators Associations in the Appalachian North, and this proposal was submitted by Mr. Ireland, who was the spokesman for that Group. We had been exchanging proposals and this was the fourth draft of the Operators' proposal that had been submitted to us. Mr. Ireland, Mr. O'Neill and Mr. Van Horn was a sub-committee representing the Appalachian Coal Producers, and this is the proposal that Mr. Ireland submitted in behalf of those associations.

By Col. Harris: We offer in evidence, if the Court please, as "Exhibit D", this proposal, and call the Court's attention to the following language, without reading all of it:

(Col. Harris thereupon read paragraph 1 of the offered document).

By the Court: Is there objection to the introduction of the document?

By Mr. Richardson: We do object, Your Honor, on the ground that it is immaterial, it has never been consummated and has no relevancy to this issue here. We understand that if this were Mr. O'Neill's agreement, there might be some occasion for admitting it, in reference to Mr. O'Neill's testimony, but as we understand, the first agreement which Major Tetlow introduced was Mr. O'Neill's agreement, namely, the Central Pennsylvania Coal Producers Association Agreement. This is what has been generally known as Mr. Ireland's agreement, and relates to another area which I did not understand included the Central Pennsylvania Coal Producers Association. For those reasons, we object to this document.

[fol. 450] By the Court: I will treat your objection as a motion to strike it out and will take it under consideration, and at this time permit the introduction of the document.

By Col. Harris: If I haven't made it clear that this was Mr. O'Neill's proposal as well as the other, I want to return and ask some more questions.

By the Court: You made it clear that Mr. O'Neill was a member of the Committee which submitted the proposal.

By Col. Harris:

Q. 84. Major Tetlow, after Secretary Ickes and Mr. Lewis entered into their agreement of November 3rd, 1943, the war Labor Board, on November 5th, handed down rulings and asked for letters of clarification or asked that the point on tonnage workers be clarified. I will ask you whether or not the Secretary of the Interior sent a letter of clarification to the Chairman of the War Labor Board?

A. He did.

Q. 85. Did he also send a copy of it to Mr. John L. Lewis, President of the International Union, United Mine Workers of America?

A. He did.

By Col. Harris: The document to which I refer first has the accompanying letter to Mr. Lewis, dated November 12, 1943, and then the letter from the Secretary of the Interior to Mr. Davis on the stationery of the Secretary of the Interior, Washington, dated November 12, 1943. I call the Court's attention to paragraphs 3 and 4 of the letter from the Secretary of the Interior to Mr. Davis, Chairman of the War Labor Board.

Col Harris thereupon read the paragraphs referred to from the offered documents.

[fol. 451] By Col. Harris: If I may be permitted to state here, if the Court pleases, and presumably, it has been difficult for you to carry all these documents in your mind, the Illinois Second Supplemental Agreement provided that all men who had been on the payrolls of the company from April 1 to June 20, 1943,——

By the Court: That's the $40.00 provision?

By Col. Harris: The $40.00 provision and what the Secretary is referring to here is that that is not applicable to the Government. I offer this as Exhibit E.

The documents referred to were thereupon filed, marked as:

"Defendants' Exhibit E," and are returned as a part of this transcript.

By Col. Harris:

Q. 86. Now, did Mr. Lewis, under date of November 12, 1943, make reply to the letter from the Secretary of the Interior to him, enclosing a copy of the letter to Mr. Davis that I have just read from?

A. Yes, sir.

By Col. Harris: That is a part of the Exhibit, Your Honor, and I will read a part of it to you.

Q. 87. Now, thereafter, and by thereafter, I mean subsequent to November 12, 1943, Major, did you attend further conferences with coal operators in the city of Washington, D. C.?

A. Yes, sir.

Q. 88. Was Mr. Charles O'Neill a member of those conferences in November of this year, that is, this present month?

A. He was.

Q. 89. Where were those conferences held and under what [fol. 452] circumstances?

A. They were called by Secretary of the Interior Ickes. The operators and miners were requested to meet in his office for the purpose of making an agreement, based upon the War Labor Board's directive or decision, and they were held in the Conference Room on the Fifth Floor of the Department of the Interior.

Q. 90. Do you recall the exact date on which those conferences began, Major?

A. I think they began on the 16th of November. That would be last Tuesday.

Q. 91. That was on Monday, was it?

A. I think it was Tuesday, sir. I think the Secretary of the Interior addressed the two groups on Monday, but I think the conferences began on Tuesday, if I remember correctly.

Q. 92. And Mr. O'Neill was there representing his association?

A. He was representing the Central Pennsylvania Coal Operators Association.

Q. 93. And were there other representatives besides Mr. O'Neill?

A. Yes, there was a great number.

Q. 94. Do you recall approximately how many millions of tons of annual production were represented in those conferences?

A. Yes, at the beginning, I think, there was about 270,000,000 tons of annual production and later on in the week, it increased to 311,000,000 tons represented. I may say that in those conferences practically all of the operators associations and operators were represented with the exception [fol. 453] of the Southern Wage Group.

Q. 95. Did the Southern Wage Group make any statement then or shortly thereafter that when the Labor Board clarified the tonnage provisions, they would join the conference?

A. They did.

Q. 96. Now, on November 18th, 1943, Thursday, did Mr. Charles O'Neill's group submit a proposition of settlement, —that was last Thursday, and as I recall, the day he was here testifying in Court,—did his group submit the proposal which I hand you?

A. Yes, this is the proposal that was submitted by the operators to the miners on November 18, 1943.

By Mr. Stuart: I understand that was submitted by the Central Pennsylvania Group?

By Col. Harris: That's right, and the other groups representing 311,000,000 tons, as I undertood it.

By Mr. Stuart: I understood from your question it was Mr. O'Neill's group but I don't understand it from Major Tetlow's answer.

A. The group was composed of Operators Associations and Operators from all the Districts other than the Southern Wage Group. It included Alabama, who was in attendance, and Mr. O'Neill, who was representing the Central Pennsylvania Coal Producers Association and spoke for them in the conference.

Q. 97. And this proposal was submitted by the Group of which he was a party?

A. Right.

By Col. Harris: We offer this document as Exhibit "F".

[fol. 454] By the Court: Is there objection?

By Mr. Richardson: Yes, if Your Honor please, we submit it is not relevant and as to the issues here, it is a thing done between other people.

By the Court: That is largely true. However, there has been some evidence about these conferences and it may have some materiality, and in any event, I am going to admit it, treating the objection as a motion to strike, so the position of the plaintiff may be preserved.

The document referred to was thereupon filed marked as:

"Defendants' Exhibit F," and is returned as a part of this transcript.

Q. 98. Thereafter, did the War Labor Board issue instructions or any—whether that be the correct word or not, any rulings with reference to tonnage workers, with reference to instructions to be sent out about tonnage workers?

A. Yes, on last Saturday the War Labor Board, based upon the letter of the Secretary of the Interior, which clarified the two questions that were in dispute, one of them the application of this formula to the tonnage workers, and the question of car pushing or spotting of cars,—the war Labor Board acted upon that clarification on Saturday and issued these instructions or decision on those two questions, in which they modified to a slight degree the clarification made by the Secretary. That was Saturday, I think about six o'clock when they issued their instructions to the Secretary of the Interior.

Q. 99. I hand you, Major, a document headed "Office of War Information—National War Labor Board, For Immediate Release—November 20, 1943, and I might inform [fol. 455] the Court that we have not had an opportunity to get this document copied.

By Mr. Stuart: We have copies.

By the Court: Pretty contemporaneous. You refer to the day before yesterday.

A. Yes, that's the letter, that's the release and the letter that was addressed to the Secretary of the Interior by the War Labor Board.

By Col. Harris: And that's signed by William H. Davis, Chairman, and then there is another page, marked "5",

with the dissenting opinion by Wayne L. Morse, and on the back, the opinion of the Industry Members. We offer all these Pages in evidence as Exhibit "G".

By the Court: Is there objection?

By Mr. Stuart: No, sir.

The documents referred to were thereupon filed, marked as:

"Defendants' Exhibit G," and are returned as a part of this transcript.

Q. 100. Major, were instructions prepared in Washington and sent out to operating managers of bituminous coal mines throughout the United States, in line with the exhibit I have just introduced, telling the operating managers how to compute the tonnage workers' rates and the rates of other men, so they could make up their payrolls?

A. Yes, they were sent out Saturday evening late.

By the Court:

Q. 101. By whom?

A. By the Department of Interior.

By Col. Harris:

[fol. 456] Q. 102. I show you these thin sheets, which were attached to your exhibit there and ask you if these sheets, which we will have to number numerically constitute the instructions sent out by the Secretary of the Interior on Saturday night last to all operating managers of bituminous mines throughout the United States?

A. Yes, these are the instructions.

By Col. Harris: We offer those as Exhibit "H".

By the Court: Is there objection?

By Mr. Richardson: I don't believe so.

The sheets referred to, bound together, were thereupon filed, marked as: "Defendants' Exhibit H", and are returned as a part of this transcript.

Q. 103. Major, there has been some discussion in the case and some testimony in the case about price fixing agencies of the Government and their function in the coal business with reference to competitive conditions. First of all, you stated a while ago that the United Mine Workers are divided into Districts, I believe?

A. The Union, the organization,—divisions, right.

Q. 104. Now, is the coal industry of the United States divided into recognized districts or fields, according to the nature of the coal mined?

A. The industry, for the purposes of the bituminous coal act, and the act defines producing districts and also price areas, which were composed of districts and also marketing [fol. 457] areas. Those have been continued by the Department of Interior under the direction of the President and are now in existence for the purposes of control over maximum prices rather than minimums.

Q. 105. Major, is the coal throughout the eastern part of the United States in the bituminous areas of the same uniform quality?

A. No, there is a great variation in the kinds of coal and the qualities.

Q. 106. The field here in Virginia is known as a low volatile field, isn't it, or the coal produced is known as low volatile coal?

A. Yes, it is known as District No. 7 and termed the smokeless field or the low volatile field.

Q. 107. Now, what effect have those agencies of the Government had on the development of coal mining in the area in which these mines are located in the low volatile or smokeless field?

A. The effect of the operation of Government regulations?

Q. 108. Yes, sir.

A. I think it has been wholesome and contributed greatly to the stability and the prosperity of the field.

Q. 109. Before these Governmental agencies were established, how was coal sold with reference to its heat-producing content?

By Mr. Stuart: May we know what Governmental agencies are referred to?

By Col. Harris: The Bituminous Coal Commission is one, I believe, and the price-fixing group, I don't know personally what their name is.

Q. 110. What agencies of the Government have had to do [fol. 458] with the fixing of prices of coal in the last few years, Major?

A. The Bituminous Coal Commission up until the Commission was abolished by Executive Order in 1939, and

since that time, by the Bituminous Coal Division, Department of Interior.

Q. 111. Before the Bituminous Coal Commission was established, was there any uniform standard adopted throughout the coal industry, upon which coal was bought and sold, as to quality?

A. No, there was no standards fixed for the marketing of coal other than what some consumer may require for his special use, which would be a matter of contract negotiations between the consumer and producer.

Q. 112. Did the Government, the Bituminous Coal Commission, install standards due to the heat-units produced, the ash content, and other things affecting the value of coal?

A. Yes. Under the law, that was a requirement and the Coal Commission made a study and held hearings and made findings upon the quality of the coals produced in each mine in the United States, governed by the act, and the act governed bituminous coal mines, sub-bituminous or lignite coals, which, of course, included all the coals of the—bituminous coals of the United States, so-called bituminous coals.

Q. 113. What effect did that have on the coal in the smokeless or low volatile field, the marketing?

A. It fixed the relative value of coal delivered in common consuming markets, based upon the heat units, the sulphur content, the moisture, the fusion point of the coals, and established prices based upon the relative values of those coals delivered in common consuming markets. It established to consumers and users of coal a basic understanding of the qualities and the kinds of coal to be adapted for spe- [fol. 459] cial use or purpose use, which was wholesome and desirous.

Q. 114. Did that redound to the advantage of this area?

A. Very much.

Q. 115. Major, I believe when you entered the mining of coal, the fine quality, I mean in size, the small sizes of coal that you happened to mine were not paid for, were they?

A. You mean to the miner?

Q. 116. To the miner?

A. No, in the early days and up until 1913, practically all of the wage agreements that the miners had, and prior to the wage agreements, the miner was paid for coal on a screened coal basis.

Q. 117. What did that mean?

A. That would mean when agreements were negotiated, the agreements would provide that he was paid for all coal that passed over a screen, over an inch and a quarter screen. Any other coal under the size of an inch and a quarter passed through the screen and only the coal that passed over the screen was paid for.

Q. 118. Now, today, do the miners get paid on a screen basis or for all the coal?

A. No, they are paid on a run of mine basis, which includes all the sizes and all the merchantable coal that is produced.

Q. 119. During the years that you have been connected with the United Mine Workers, have they consistently and uniformly, in their wage demands, attempted to get better working conditions, shorter hours and higher wages?

[fol. 460] A. Yes, the function of the Union and the purposes of its organization was to improve the living conditions and the working conditions of the miners.

At this point, a recess for the period of fifteen minutes was taken.

Cross-examination.

By Mr. Richardson:

Q. 1. Major Tetlow, bearing in mind your early experience, I dare say you were quite happy to see the Fair Labor Standards Act expressly forbid child labor?

A. Yes, and I was glad that the different states and the legislative bodies had made substantial progress in eliminating it and that through collective bargaining, it was eliminated. It is certainly—we are to be congratulated upon any progress we have made in that direction.

Q. 2. Pains were taken to provide in that Act for the express and clear elimination of that abuse, if we may now call it such? I believe I shall ask you to speak in answer to my question so the reporter may get your answers clearly.

A. Yes, sir.

Q. 3. Did you take any part in the formulation of the Fair Labor Standards Act? Did you appear before either of the Committees of the Congress while that Act was under consideration?

A. No, I did not.

Q. 4. Do you know whether your organization had representatives so appearing?

A. I can't say whether they did or not.

Q. 5. Was there at any time any expression made in be- [fol. 461] half of your organization to declare before the Congress or any committee of the Congress its purpose, by the provisions of the Fair Labor Standards Act, to change the basic work day on basis of pay within the industry?

A. No.

Q. 6. And I assume the same is true in respect to consideration of these matters before the National Recovery Administration, is it not? If you will cast your recollection back to 1933, when the National Industrial Recovery Act under, I believe, General Hugh Johnson,—when a Code of Fair Competition for this industry was being considered, and at that time other witnesses both from employers and employes appeared, there was not at that time any representation made, looking to a change in the work day or the unit of pay?

A. No, the Miners' organization has always taken the position that the question of wages, hours and conditions of employment should be governed and controlled by agreements under collective bargaining in the industry more so than by legislation. We have always taken the position that any legislation which will improve standards of working men and women,—to favor it and foster it and support it. Fundamentally, we are opposed to legislation that controls the daily wage and conditions of employment. We think that is a relationship that should exist between employer and employe.

Q. 7. And you feel that this area should be kept open for complete freedom of the parties by collective bargaining to contract as in the circumstances they may be advised to do so?

A. As a general principle, I said yes. Certainly, any law [fol. 462] that governs—law, of course, comes first. Any contractual relationship must be based upon standards of law. That's fundamental, too, and any legal standard, by law, that governs employment or restricts—we certainly favor that. No organization, no people can endeavor to set aside law in this country. They must conform to it, but as a general proposition, as I said, and I restate it, the United Mine Workers have always felt that any relationship with their employer, and because of the competitive conditions existing, it was necessary to have a wage structure of general application in all the producing districts because of the.

competitive nature of the industry. They were striving for uniformity because they knew that the competitive relationships were such that unless these standards were applied uniformly, it would prevent and destroy the carrying out of any agreement.

Q. 8. Then throughout your experience you say that the Union has recognized the highly competitive character of the bituminous coal industry and has endeavored to adapt its requirements and demands to those competitive conditions?

A. That's right, sir.

Q. 9. And one of the means by which it has endeavored to make such adaptation has been to arrive at uniformity in the cost of production throughout the industry?

A. No, not uniformity as to cost, and when we are talking about cost, we are talking about the cost of producing a ton of coal, but uniformity as to wages and earnings of men. You may have conditions in two mines where a man would produce five tons in one and seven in the other, and it took as much labor to produce the five tons as it did the seven, so we have argued and striven that the miner who performed [fol. 463] the service, like service, in one field or another, should receive equal compensation. If you are familiar with the industry, we have districts with per capita production around three tons per day and other districts as high as eight and ten tons per day. We have contended and our arguments and our policies have been predicated upon the principle of the men who render service for a number of hours should be paid equally. That's not been possible in complete fulfillment but to that goal we have been striving all through the years.

Q. 10. Then shall I say that you have, in your agreements, made concessions to the recognized necessity of uniformity of producing cost in order that the known competitive conditions might be met?

A. No, no. Just the reverse. We haven't attempted to make wage rates upon a basis of equal cost of production per ton, but upon equal service rendered and time as a basis for proper renumeration for men who perform the service. Now, in an industry such as we have, it is certain that some mines with higher costs than others have advantages that overcome the low cost mines. They may have it in transportation cost, they may have it in some other factors which lower the cost, or they may have an advantage

in quality in part' lar markets where high cost mines exist as against l cost mines, successfully, so we have striven for standard rates of pay in all producing districts whether on yardage, per ton or day work, piece or day work base, that equal performance of equal service should be given equal pay. That's been the Union's position throughout the years.

[fol. 464] Q. 11. Now, if a seam had in it a small parting under four inches, that would be a handicap in the way of successfully operating that mine and the competitive offering of that coal in the general market, would it not?

A. Well, there is very few seams of coal that is clean and free from impurities. In every area, you have mines, the seams of coal with partings in them, and impurities that must be removed. That's an actual condition that exists generally in all fields.

Q. 12. And you have agreed that where there is such a condition, and the parting does not exceed four inches, then the miner shall remove that parting, handle it as may be necessary, without additional compensation over his per ton pay for mining the coal; is that not so?

A. That's true. You may have a local agreement or district agreement and most of those questions of dead work rates of pay are subject to local or district adjustments because of the local conditions, which vary, and these dead work rates some times provide that the miner shall perform a certain amount of dead work service without compensation, which is included in the tonnage rates.

Q. 13. And just such a provision is included in the Pocahontas-Tug River Agreement, which I hand you, is it not, Major? That is the 1941 Agreement, I forgot the exact exhibit number.

A. Yes.

Q. 14. And if you will hold that just a moment, on the next page a similar provision is in relation to the draw slate or over-burden, if that does not exceed four inches?

A. That's right. That's a provision of this district [fol. 465] agreement.

Q. 15. The Booklet shown you is Plaintiff's Exhibit No. 9. —That is to say, if a miner working in a mine where there is a four inch parting and a four inch over-burden of draw slate that falls with the coal, is required to handle that parting and that overburden, he would not be paid as much for the same work as he would be if he were in a mine in

which there were no such parting at all and no such over-burden which falls with the coal?

A. That's correct.

Q. 16. And the agreement that he would do this relatively small amount of extra work incidental to his mining was a concession to the competitive requirements?

A. No, I don't think so. I don't think it had anything to do with the competitive requirements. It had to do with the ability of the miner to earn. You may have a mine—as in this agreement just shown me, this Pocahontas-Tug River Agreement, which provides that the miner shall perform that service up to four inches of impurities in the seam or slate over the seam and remove it without additional compensation. He may have other factors that is available to him where he may be able to load as much coal as a miner that had all clean coal. You have many conditions, such as roof conditions and water and all those things which men are required to meet in mining, and where you may have a disadvantage in one mine in respect to impurities in the coal, you may have advantages that overcome that disadvantage as compared to another mine. We have mines where the cost of pumping water is enormous. We have other mines where there is no water,—in fact, they put water into the mine, and we have mines where you can mine [fol. 466] the coal without any timber methods of mining, practically no timber at all, and we have other mines where the timber costs will be eight, ten, fifteen cents a ton. All of it goes into the ability of the producer to market his coal and successfully compete. Where mines that have great disadvantages are operating, it is apparent that there must be advantages which he enjoys that permits him to continue to operate and to live. The very fact that mines exist and are operating is indicative of the fact that whatever disadvantages they may have, they have advantages accruing that off-sets the disadvantages.

Q. 17. By way of measuring the material that might be involved in a four inch parting and a four inch over-burden of draw slate, recalling your computations a while ago, that could involve at the typical working place up to four or five tons a day, might it not?

A. Yes, because the slate or *co* would be heavier than the coal and it wouldn't take as many cubic feet of rock to equal a ton of coal.

Q. 18. Now, these local conditions to which you refer would be well known to the district representatives of the Union who would make the local agreement?

A. Yes.

Q. 19. And the variations to which you refer as between mines might also exist within mines?

A. That's right.

Q. 20. The contract provides, I believe, that the coal loader, who, of course, is a piece worker, shall do certain things incidental to his loading of coal, and that has always [fol. 467] been recognized as a necessary part of his work, has it not?

A. Yes. The tonnage rate includes certain services that the miner is required to do other than the actual mining and loading of coal. In practically all of our agreements, and as a requirement of law in the respective states, the miner is required to protect himself fifteen feet from the working face; he is required to do the timbering there and make that place safe unless it is timbering that goes beyond the ordinary timbering of setting mine props and cap pieces. If he has to set cross-bars and timber above the ordinary, of course, as a general rule, he is compensated for that, but normal work of the miner at the face, tonnage work, includes the drilling of the hole, shooting the coal, furnishing explosives, until the last agreement, the furnishing of his tools, that was all included in the tonnage rate. This service the miner is required to do in that tonnage rate and in most of the districts, the temporary track that's laid at the face, the miner is required to lay that as part of his duties. That is all included in the tonnage rate.

Q. 21. And of course, all those things were taken into consideration by the contracting parties when they negotiated the amount of the rate?

A. That's right.

Q. 22. The same is true as to other piece workers in the mine, machine cutters, for instance?

A. That's right.

Q. 23. They also have duties to perform incidental to the operation of their machines and the cutting of coal?

A. That's right.

[fol. 468] Q. 24. And their rate of compensation is determined by an overall pay for everything that necessarily enters into the cutting of that coal?

A. The tonnage rates were predicated upon the services a man rendered at the face and that rate encompassed the duties provided for in the agreements as a service he would perform in producing that ton of coal. It's an outgrowth of conditions that have existed for years in the industry. There has always been disputes and arguments about these contracts and miners have entered into contracts and made them when they knew the terms accorded wasn't fair and reasonable but they were compelled to accept them under circumstances that they couldn't control.

Q. 25. But in working out the rates, both parties, both employers and employes, have taken into consideration all of the factors which their experience had taught them were included in the performance of the duties to be done by these particular men?

A. That's right. It's been one contract after another and these have been provisions which have been made and which we have carried out, and we believe in the fulfilment of our contract, carry it out whether it hurts us or whether it don't. A contract is a contract. We seek to remedy any defects in the contract at its expiration, from time to time, and that's been the process down through the years. There has been modifications and changes constantly in the industry, as a result of new conditions, increased use of machinery, increased knowledge of the dangers of mining, changes in ventilating methods, constant improvements [fol. 469] taking place, daily and yearly, and as these improvements come and advantages accrue, the miners have formulated their policies upon those changes and tried to secure a reasonable usage of those improvements. We have had in our contracts for many years this troublesome question of the advantages accruing from modernizing the industry and we have agreed basically that any advantages accruing by the introduction of modern machinery in mining, that both operators and miners participate in such labor saving and such advantages, and that has been followed throughout the years. While we have not agreed upon the division of the increased efficiency or increased productivity, as a general rule, that's been the policy of the Union.

Witness stands aside.

At this point, it being 1:00 o'clock P. M., a recess was taken until 2:00 o'clock P. M., at which time the trial of this case was resumed.

PERCY TETLOW, the witness heretofore introduced on behalf of the defendants, being recalled, testified as follows:

Cross-examination.

By Mr. Richardson:

Q. 26. Major Tetlow, you referred to certain hazards in the occupation of miners. That's a matter of which the Union has been cognizant all through its existence, has it not?

A. Right.

Q. 27. And has laid much emphasis upon the endeavor to minimize the Zazards?

[fol. 470] A. Correct.

Q. 28. The existence of these hazards has been taken into account in considering and arriving at the general scales of wages to be paid for inside workers, is that not so?

A. No, I wouldn't say that the hazards have been taken into consideration altogether. The hazards of mining, of course, has always been incident to the industry, but there has been a constant effort on the part of mining men to improve mining conditions and to eliminate some of the hazards that can be eliminated. There are hazards that can be definitely eliminated. There are other hazards that are unforeseen that I think will be with us always.

Q. 29. I mean, Major, there has never been any effort to obtain a stated factor of compensation on account of hazards as such?

A. Only in a general way. We have always contended that the hazards of mining and the loss of time incident to the hazards should be computed into the wages. We have always felt that miners, as in this present arrangement of this dead work week, only a small percentage of the men will be able to work six days. That is not true to the extent that an accident may occur to a man bodily, but to disruption and prevention of the work day, which the miner must meet. If, under a six day week, you get an average

of five days, and if it goes over five days, we will be fortunate indeed as an industry, because of the lost time that's bound to happen as a result of accidents in the mine which affects the property and not the body. So when you consider the lost time as a result of the hazards, we have [fol. 471] always felt that that should be considered in because the ultimate earnings, weekly or annually, should be considered in any wage consideration. That's been our position on that throughout the years.

Q. 30. And so you undertook to have the earnings or the rates of pay take into account these elements of hazard?

A. That's right, and also the ultimate earnings of the miner. There is many things in connection with mining that have been changed, or we meet a condition and try to deal with it intelligently, and with justice, and we are not able to remedy that for years. Ultimately, it will be changed and every one is glad of the change, but in these processes, it takes time to overcome the conditions. They can't be overcome in a year or a number of years. We strove for years to abolish the screened coal system in mining in this country as being unjust, and took the position the miner should be paid for all the merchantable coal he produced. It took us fifty years to accomplish that but it was finally accomplished, so, in these processes of collective bargaining and dealing in the employer-employe relationship, you might strive to bring about a condition that it might take you years to do it. Even though it is just and fair, it can't be accomplished and abolished until there is an understanding and realization of all sides as to the merits involved. Certainly hazards of mining should be considered and the dangers incident to it, because of the effect it may have upon the earnings of the men who work in the mines. We all know it is a hazardous industry. I have striven for years, I think it has been one of the goals I have sought from the beginning, more so than any other, [fol. 472] in legislative matters, I have endeavored to have state legislatures improve mining conditions, to reduce this tremendous loss of life, and most of it can be prevented. One of the things, of course, the industry has had to meet in the solution of these problems is the intensely competitive relationships that exist in the industry. There was a time, I remember, when we didn't know that coal dust was inflammable and would ignite and generate gases by heat, the transforming of dust by heat into gas that would in-

flame and destroy, we didn't know that, but we finally found that by adding moisture in the air currents, in certain seasons, and specially in the winter time, that we could reduce that hazard, and the same thing is true with the methods of ventilation and methods of mining, and I have been hoping throughout the years that some day in these United States that we would recover coal on a completely retreating system, and leave the worked-out places in the rear closed in by the stratas so coal dust and gases couldn't accumulate in old workings. We may reach that some day but we must strive constantly to reach these objectives and the credit goes to the mine management who are striving to solve these great problems. I remember when carbide was first introduced for lighting, the State Mine Inspectors of Ohio refused to allow it to be used, because they thought it was dangerous, and these things have been a matter of progress, development and study, and we have all been working in that direction, but when you come to compute these hazards, the industry and society should recognize the hazards of mining and adequate compensation should be provided to take care of these hazards which [fol. 473] destroy men's opportunity to earn and for families to subsist, and those are the goals for which we are all striving. It may take us a long time to do it, but in the end, that should be accomplished. I don't know if I am answering your question or not.

Q. 31. What you are saying, Major, is very interesting, and whether you answered my question or not, I do not have any quarrel with what you say. In considering the hours of work as well as the rates of pay, the hazards have been in the minds of the contracting parties, have they not?

A. Yes, hours of employment are a basic consideration because under normal conditions, we can produce more coal than the country can consume. The average working days only under extraordinary conditions exceed two hundred days a year. Today we are in the era of the greatest production of the world's history. We will approach six hundred million tons this year of bituminous production and the average work time under these extraordinary conditions will not reach two hundred and fifty work days, so, the work days and the reduction of hours underground ought to be reduced as productivity increases or as efficiency in combustion assists in the problem. These two processes

have been running hand in hand constantly, increased production through mechanization, lowered consumption through increased efficiency in combustion. It is estimated that in the last fifteen years our increased efficiency in combustion has decreased the need of two hundred million tons of coal annually, so these things compel us to look forward to shortening the work day underground in order that we will have sufficient work days in the year or a week rate that will permit us to live throughout the years.

[fol. 474] Q. 32. You recall, do you not, Major, that this was the Union's general attitude toward these matters as expressed by your President, Mr. Lewis, before the NRA when the matter was rather unexpectedly started in the summer of 1933?

A. Yes, sir.

Q. 33. And the brief of argument made by him, which appeared in your official Journal of the United Mine Workers?

A. I can't recall it now.

Q. 34. The burden of his presentation and argument, as you recall it, was, I believe, that this matter of hazards and the other intangibles should be taken into consideration in producing and yielding the rates of pay which were asserted by him to be reasonable and the short hours which were asserted by him to be proper?

A. I don't recall that.

Q. 35. What you have said about the hazards of mining is, of course, general and based upon Bureau of Mines records? I mean that it applies to all mines. You made no effort to single out this mine?

A. No, my testimony went to the general bituminous mining industry.

Q. 36. As a matter of fact, you have no familiarity with this particular mine?

A. No, only general knowledge of it, sir.

Q. 37. Have never been in it?

A. No, sir.

Q. 38. You have said something about the principal haz-

[fol. 475] ards resulting from the overhanging strata. That hazard is measured by the manner in which the overhanging strata may be dealt with, is that not so?

A. It is all dependent on how it is dealt with, more or less, because where you have in travelways and main haulage ways which are generally the main ventilating entries,

you have a greater pressure as a result of the ventilation in those main airways, and a good bit depends upon the moisture that may be in the air and its effect upon the stratas, and the constant movement of trips over the haulage ways and the jarring and shaking and the effect upon the roof. If these traveling ways are properly timbered, in the first instance, and they are getting more and more to the use of steel for use in timbering, for cross-pieces, steel I-beams, if they are properly timbered in the beginning, it will relieve many of the accidents and dangers that may occur later on. The main haulage and traveling ways are permanent. They are used possibly for the life of the mine. Other sections of it are worked out and abandoned, but these all remain as the main ventilating and haulage roads, so they must be kept up promptly and the timbering must be promptly done in these to take care of the life of the property and a good bit depends upon the management, the manner in which they perform their duties in making them safe. We have even had to complain about certain management and go to the Mining Department and insist upon the removal of certain mine management, because of their failure to apply these ordinary safe-guards.

Q. 39. Again you are speaking generally, and not in reference to this company?

[fol. 476] A. That's right.

Q. 40. If the travelways are properly timbered and properly supervised, and the timbering maintained as inspection may show is necessary, there is no reason why the haulways should be unduly dangerous, is there?

A. Oh, yes; oh, yes. The longer you use a haulway or travelway, and the coal is removed from each side of that travelway, and the greater length of that travelway, the greater the hazards because of the pressure of the overlying stratas upon the remaining supports which have been mined out on each side, and a great deal depends upon the pillar supports left to protect this main haulage, but always, constantly, day in and day out, these travel roads and haulage roads must be inspected and must be protected because of this constant change in the pressure and in the condition of the travelways. You have got to remember that these haulage roads and travel roads which remain for years under the constant pressure and the removal of the coals on each side of them, makes it necessary that constant supervision of their safety is always there, and

that's one reason why we have so many accidents on these travel roads and haulage roads. You don't get as many accidents in the deveioping entries as the result of falls of rock as you do in the haul roads, which are left there for months and years, and they are the dangerous roads, they are the dangerous sections of the mine when you come to consider travel and haulage.

Q. 41. If it appears that in this particular mine there have been no accidents or injuries along the travel ways on account of overhanging strata, wouldn't that indicate [fol. 477] to you that proper inspections and supervision and care have been exercised so as to have a minimum of hazard in that regard?

A. That's correct.—That's correct, and it may be, too, it may be due to the physical condition of the stratas. You may have stratas of sand rock that won't break, the pressure will come down constantly on it and the sand-rock won't break. You take limestone and other types of stratas will break and I have seen travel ways that stood for fifty years and never broke. It all depends upon the type of stratas and upon the pressure that may be exerted in that open space where that coal is taken out, and you may have in the mine, you may have a fine situation and condition as the mine develops, and reach a section where the roof will be dangerous and bad and break and be just the opposite to what it was. Those are things that happen in mining. They don't always remain constant and the same in a mine. You may have two places side by side and one place, you have to use twice as much timber as you would in the other to keep the place safe. That's a natural situation in mining..

Q. 42. I don't want to interrupt you. Indicate to me in some way when you have finished your answer.—You have referred to hazards inside commencing when the miner enters the mine. There are hazards outside, are there not?

A. There are hazards outside of the mine, of course, but there is greater hazard inside.

Q. 43. And the miner or employe about the premises where the industrial operations are in progress is subject, of course, to such hazards as may be so long as he is on the premises?

A. Yes, sir, that's right.

[fol. 478] Q. 44. You have referred to your travels in

Europe and studies of conditions over there. At what time did you make those studies, Major?

A. The last time was in 1926.

Q. 45. You found many conditions in the mining industry there different from conditions obtaining in our country, I dare say?

A. Yes.

Q. 46. As a general proposition, the wages which are paid to the inside workers in European and British mines are very greatly under the wages of our men over here?

A. They are.

Q. 47. And by the same token, the per man production over here is considerably higher, isn't it?

A. That's right.

Q. 48. Another testimonial to the worth of our American men.

A. Yes, I think it is well known, we all know what that rate of production is. Our productivity is, on a whole, about four times greater than that of Continental Europe and Great Britain.

By the Court:

Q. 49. Do you mean in aggregate volume or per man?

A. Per man per day. There is mines in Belgium where the production per man is less than a ton. In fact, the average of Belgium is less than a ton. Germany and England had the highest rates of production and the highest rates in all those countries has been approximately two tons per man.

[fol. 479] Redirect examination.

By Col. Harris:

Q. 1. Major Tetlow, Mr. Richardson asked you about all of the duties that the miner performs being taken into account in the fixing of the wage scale. Am I correct that you answered that all the duties he performed at the face were taken into account?

A. All the duties he performs at the face?

Q. 2. Yes, at his regular working place.

A. That's right.

Q. 3. Was travel time taken into account? In other words, has travel time been paid for in America?

A. No, it hasn't.

Q. 4. He asked you about hazards. Does the pay in Mine A for the same type of work in the same district continue on the same scale for that work in Mine B even though one mine is very hazardous and the other is far safer and less hazardous?

A. The rates would be the same in Mine A and Mine B.

Q. 5. Now, one question, if the Court pleases, that is not in re-direct, I forgot to ask it this morning. We have been talking about competitive conditions and I am curious about the kind and quality of coal that's involved in this field here. It is poor quality, high quality, low price or high price?

A. It's a low volatile coal.

Q. 6. What do you mean by low volatile coal?

A. It's low in volatiles and it's pratically smokeless coal. It's a high-grade, high quality, by-product coal. These are the finest, best coals we have in the United States in this [fol. 480] low volatile area. I am not talking about these particular mines. I am talking about the Pocahontas-Tug River Area. The quality is such that it bears a higher price in the market, the demand for the coal is so great, and it is increasing, for this kind and type of by-product coal, that it enjoys a marketing condition that isn't surpassed by any other coals produced in these United States.

Recross-examination.

By Mr. Richardson:

Q. 1. Major, you mean that travel time has not been paid for as such, don't you?

A. We contend it has never been paid for. We have been arguing and demanding it for years as a reasonable, just consideration but we have never been able to get the producers to agree to it. It is like all the other questions in the past that have been settled. You may have just consideration due, but you can't obtain them. We have never obtained travel time pay because we couldn't get the employers to pay it. We have been contending for years and years and I know that the only reason why it hasn't been paid is because the employers wouldn't agree to it, and we have contended, as I said, for over twenty years and argued for this bank to bank arrangement as a just claim, and the employers have denied it. There is

many of them, of course, I think, that recognized the claim as being just and would like to compensate for it, but due to the fact that the general trend in the operating groups is to object,—and may I say in that connection, in my entire life I have never known a just consideration that's been submitted that has been accepted in the first instance [fol. 481] by the producers in any wage negotiation I have ever attended, and I have attended the most of them.

Q. 2. You said a while ago that what you wanted and have striven for in respect to wages was a compensation that covered the elements that enter into the employment, particularly with reference to the hazards.

A. That's right.

Q. 3. And that is another of the elements in your mind when you are negotiating a scale of wages?

A. That's true, and we considered that travel time was a hazard and was work time, and that we should be compensated for it and we never could get the employer to agree to it in collective bargaining agreements.

Q. 4. It was entirely feasible, was it not, to measure the working day on a face to face basis and include in that measure enough to take care of the travel time?

A. No, I don't think that would settle the question.

Q. 5. I say that could be done. Assuming you thought a man ought to have one dollar a day or two dollars a day for travel time, you could agree that his rate would be ten dollars a day at the face and include that one dollar or two dollars for the travel time, couldn't you?

A. No, I couldn't.

Q. 6. It is a little difficult for me to understand why it couldn't be done. It is understandable that you might not agree on the amount, but why couldn't it be done?

A. If the consideration is travel time, and that's to be compensated for, travel time, then you should be compen- [fol. 482] sated for travel time.

Q. 7. Then is it your idea that the Union has always contended and now contends that it should be paid, each man for the precise number of minutes of travel time which he employs in his occupation?

A. If you would follow it to its logical conclusion, that's correct, but we have said time after time we was willing to take an average of a mine or willing to take an average of an area in order to place every one on an equal basis.

We have endeavored every way we could to secure knowledge of travel time in the industry. We proposed to the operators in New York and also in Washington this year, and we agreed with the Secretary of the Interior when he requested both sides to make a survey to determine the actual travel time, so that that would not be a moot question. We agreed to it and the operators suggested,—in fact, they have objected to any trend towards securing accurate information. That's all for preventing the accomplishment of knowledge. When you sum all this question up, this whole controversy, the miners have been contending for it, the operators have been rejecting it, and we have not been able to agree. We have been contending for it year after year. The operators say no. We say yes. We can't agree, as we have been doing, and until there is a realization of the justice in the claim, it will not be settled unless some one other than the operators brings about a settlement.

Q. 8. You say you have been contending for it consistently?

A. Right, sir.

[fol. 483] Q. 9. Show me a single demand that the Union has made within the twenty year period next prior to 1943, in which you ask for payment for travel time as such?

A. Our demands have been in every joint conference in the last twenty years. The question of the bank to bank method of computing time has been a standard demand of ours.

Q. 10. Will you be good enough to pick out your demands presented at the successive wage conferences and show me that demand which argues for the thing you now assert?

A. I haven't got the record of these joint conferences here.

Q. 11. I will go so far as to request that after you retire from the stand, you go back over your records, and if there is in any wage conference within the twenty years next prior to March, 1943, a demand made by the Union for the payment of travel time as such, that you supply a copy of that to the reporter.

A. Our demands have never been any other than computing time underground from portal to portal. The question has been based solely upon that issue. From bank to bank, and in the last conference, from portal to portal. The description of "portal to portal" was made in the last joint

conference for the first time. Prior to that time, it was from "bank to bank," but we understood bank to bank was portal to portal, the entrance of the mine, and our demands began away back, as I told you, over twenty years ago, and in every convention of the miners, it's been an issue, it's in their basic law, their Constitution. It's an issue that has never been lost sight of.

Q. 12. Was it presented to the NRA in 1933?

[fol. 484] A. As pay for travel time?

Q. 13. As such?

A. As such,—it was never submitted in that language and in that term. It's been a bank to bank or portal to portal demand.

Q. 14. It was in contemplation of the parties as a means to accomplish other purposes but was not asserted as such, isn't that so?

A. It was a demand for portal to portal and bank to bank payment. That was the basis of the bank to bank proposal and it has never been changed, but you are correct sir, when you ask whether or not we have submitted a proposal for travel time as such. We never did. Our position was payment from portal to portal on the basis of total time underground, which, naturally, would include travel.

Witness stands aside.

W. S. White, another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Senator Muse:

Q. 1. You are Mr. W. S. White, I believe?

A. Yes, sir.

Q. 2. Mr. White, where do you live?

A. I live at Jewell Ridge, Virginia.

Q. 3. You are employed by what company?

A. Jewell Ridge Coal Corporation.

Q. 4. How long have you been so employed?

[fol. 485] A. This coming January will be three years.

Q. 5. I believe you are what is known as a coal loader?

A. Yes, sir.

Q. 6. Commonly called a coal miner, the general term is coal miner, is it?

A. Yes, sir.

Q. 7. Mr. White, how long have you been connected with the coal business or been a miner?

A. Well, for about eleven years, off and on.

Q. 8. How old are you now?

A. I am thirty-six.

Q. 9. You have been working since 1940 for the Jewell Ridge Coal Corporation?

A. Yes, sir.

Q. 10. At which one of its mines?

A. Mine No. 1.

Q. 11. That's the one we call Jewell Ridge, I believe?

A. Yes, sir.

Q. 12. Mr. White, starting off with your day's work in the morning, at what time do you arrive at the lamp house?

A. Well, between, right around between six-thirty and six-fifteen.

Q. 13. At what time do you go into the mines?

A. At seven o'clock.

Q. 14. When you arrive at the lamp house, what is the first thing you do?

A. Well, I come down to the lamp house and if there is a line of men there, I get in line with the rest of them and get [fol. 486] my light and if I have any tools in the shop, I go around behind the lamp house and get my tools at the shop.

Q. 15. In order to get your lamp, do you have to surrender a check?

A. Yes, sir, we have a little check with a number on it.

Q. 16. Does the same number appear on the check as is on the lamp?

A. It does if my lamp is not out of order.

Q. 17. Generally speaking, the same number is on the lamp as on the check?

A. Yes, sir.

Q. 18. After that, you do what?

A. After getting the lamp, I always go around behind the lamp house to the shop, and if I have any tools there, I get them and take them up to where the man-trip stops.

Q. 19. Name the tools that you, as a coal miner or coal loader, use?

A. We have a pick and shovel and augur and breast-

plate and tamping-bar and two wedges, an ax or saw, either one, battery and a cable and a file.

Q. 20. So if you have any of those tools in the blacksmith shop, you go get them?

A. Yes, sir.

Q. 21. For what purpose do you bring your tools to the blacksmith shop?

A. To have them sharpened or a handle put in a pick or augur sharpened or pick sharpened.

[fol. 487] Q. 22. About how often during the week would you have to bring out one or more tools to the blacksmith shop?

A. That all depends on how it is fixed. If it is fixed pretty good, maybe once a week you will bring out a pick to be sharpened or happen to break a handle,—maybe four or five times a month you will be bringing something out.

Q. 23. You say if you have any tools in the shop, you take them where?

A. Up to where the man-trip stops to pick up the men.

Q. 24. How is this man-trip made up?

A. It was made up from one long tram, the one I rode, and I believe there was three sections of men rode this tram, and when they would get to where one section of them was going, they would cut off the cars, cut it off at the tool car, this trip that was going to the other section, and take the tram on, and when they got to another place, they would cut off again.

Q. 25. In other words, the cars going to a particular section would be cut off when it arrived at a proper place to go down to that section?

A. Yes, sir.

Q. 26. Was it customary for the men going to the same section to ride in the same cars going to that section?

A. Yes, sir.

Q. 27. What kind of cars did you ride in?

A. Ordinary steel mine cars.

Q. 28. Are they the same cars used for hauling coal?

A. They were.

Q. 29. In what condition did you find those cars?

[fol. 488] A. I found some in pretty good condition and some in pretty bad condition.

Q. 30. Suppose it rained?

A. You will find water in the cars.

By Mr. Stuart: May we have the understanding, if Your — please, that testimony along the line of discomfost is objected to as immaterial.

By the Court: Very well. I imagine a good deal of this testimony will be repetition, about matters as to which there is no conflict and I am not going to stop you unless it becomes too extensive, but bear in mind that the same cars which haul the coal are used for the man-trip and let's confine ourselves as much as possible. I am not going to unreasonably limit you but as to matters about which there is no controversy, let's have a minimum of testimony.

Q. 31. Suppose it should snow during the night, from one inch on up to six inches, or any other depth, in what condition would you find the car in the morning?

A. In the time I have been there, I have found as high as six inches of snow in the cars.

Q. 32. Was any effort made to put the car in any condition for the men to ride in, for the comfort of the men?

A. No, sir.

Q. 33. Were the cars brought to you in the same condition as the weather made them during the night?

A. Yes, sir.

Q. 34. Where do the men sit in those cars?

A. They sit up on this little bench, what they call the "mourner's bench."

Q. 35. That's a little raise on each side?

A. Yes, sir.

[fol. 489] Q. 36. In the middle is a depressed sunken place?

A. Yes, sir.

Q. 37. Is there any space for the men to sit on to protect themselves from the condition of the car?

A. No, sir.

Q. 38. Is it customary for the men to get a cardboard or something to protect themselves?

A. Yes, sir, generally. Most of them carries a piece of sack or something in his pocket.

Q. 39. Who is in charge of the man-trip?

A. The section foreman.

Q. 40. Where does he ride, usually?

A. He generally rides next to the tool car.

Q. 41. Does he ride in one of the cars going to his section?

A. Yes, sir, generally.

Q. 42. In which his men are located?

A. Yes, sir.

Q. 43. Who gives the orders for the man-trip to move in?

A. Well, generally, Mr. Hagy or the mine foreman one will be standing there and tell him to go ahead.

Q. 44. Does your section foreman in the cars going to his section, does he exercise any supervision or control over the men, and if so, to what extent?

A. Well, if you get too many men in the car, he will tell you to scatter out and not too many men in a car, and if you get on the wrong side of the car where the wire is at, he will tell you to move over.

Q. 45. What are the rules of the company as to the number [fol. 490] of men riding in a car on a man-trip?

A. I think seven men to the car.

Q. 46. Suppose eight or more men get in a car, does the section foreman give any orders as to what the eighth should do?

A. Yes, sir, they would tell them not to crowd the cars, and to get in another car.

Q. 47. How are these man-trips propelled?

A. They are pulled by an electric motor.

Q. 48. Does it have a trolley like a street car?

A. Yes, sir.

Q. 49. Has a trolley wire, also, I take it?

A. Yes, sir.

Q. 50. Is that trolley in the center or over to one side?

A. Over to one side.

Q. 51. Are the men required to sit opposite the trolley wire?

A. They are.

Q. 52. As you go down in the mine on your man-trip, how do the men sit? Are they able to sit up erect or required to bend over by reason of the closeness of the roof?

A. Well, in some places you can sit up erect and other places you are sitting bent over.

Q. 53. What section do you work in?

A. Straight First North.

Q. 54. As best you can estimate it, how far is that from the portal?

A. I would say about four miles and a half.

Q. 55. After you leave the main passage way, entrance way, and branch off to go down to your particular section,

[fol. 491] are you able to sit up in your cars or do you have to lean over?

A. No, sir, it's very low.

Q. 56. Indicate if you can in your chair there about to what extent you have to lean over?

A. You have to get over pretty low, something like that. (Demonstrating).

Q. 57. How far do you travel in that position to get to your man-station, approximately?

A. I would say about six or seven thousand feet, something like that.

Q. 58. Is that a comfortable position?

A. No, sir.

Q. 59. What would happen if you sat up straight?

A. You can't sit up straight.

Q. 60. Why not?

A. For the roof.

Q. 61. The closeness of the roof over your head?

A. Yes, sir.

Q. 62. At what point in your section do you get out?

A. Get out at the man-station.

Q. 63. Does each section have its man-station, generally speaking?

A. Yes, sir.

Q. 64. What is a man-station, your station, for instance?

A. It's a little old breakthrough there where we all gather up to, got a powder house there and the man-trip leaves from there and we call it a man-station.

[fol. 492] Q. 65. The man-trip on your section is where you catch the man-trip coming out or get off, going in?

A. Yes, sir.

Q. 66. And that's either at or close to the powder magazine inside the mine?

A. Yes, sir.

Q. 67. What do you do at the man-station?

A. If we have any tools, we take them out of the car, and lay them down and set our dinner buckets down and check in,—we have a little check that we hang up on the board.

Q. 68. Is that like the lamp check?

A. No, the check we put on our cars is made different. It has a number on it and is practically the same as this.

Q. 69. Do they all have the same number?

A. Yes, sir. And the section boss will open the powder house and call our numbers and we get our powder and get our bucket, and if we have any tools, get our tools, and walk from there to the work place.

Q. 70. You mean your dinner bucket?

A. Yes, sir.

Q. 71. Do you also carry your water into the mine in that same bucket?

A. Yes, sir.

Q. 72. In what form does the powder come?

A. Comes in little sticks about eight inches long.

Q. 73. Do you also get some detonators or explosives at the powder magazine?

A. Yes, sir.

[fol. 493] Q. 74. Do you have a separate box in which you carry these detonators?

A. Yes, sir.

Q. 75. That is attached or is a part of your powder bag?

A. No, we put it down in the powder bag, this box.

Q. 76. How do you get from the man-station to your working place at the face of the coal?

A. We walk.

Q. 77. In your section, about how far did you walk?

A. About nine hundred and fifty feet, I guess, something like that.

Q. 78. Carrying your dinner bucket?

A. Yes, sir.

Q. 79. Any tools you may have.

A. Yes, sir.

Q. 80. Your powder and detonators?

A. Yes, sir.

Q. 81. You told me how far you walked before but I missed it. How far do you walk?

A. About nine hundred and fifty feet.

Q. 82. Does that take you up to your room where you are actually loading coal?

A. Yes, sir.

Q. 83. In walking that distance of nine hundred and fifty feet, are you able to walk standing up erect?

A. No, sir.

Q. 84. How do you walk?

A. Walk all bent over.

[fol. 494] Q. 85. Would you mind demonstrating how you walk?

A. (Getting out of witness chair and demonstrating): Walk something like this.

Q. 86. Is that a fair illustration of how you walk?

A. Yes, sir.

Q. 87. When you get to your room,—and that's where you load coal?

A. Yes, sir.

Q. 88. Do you work in that same position?

A. Yes, sir, we have to work in the same position.

Q. 89. The room you work in on your section that you are working on, what's the approximate height of the coal or thickness of the seam?

A. About four feet, maybe it runs a little more or little less.

Q. 90. About forty-eight inches?

A. Yes, sir.

Q. 91. In working and loading that coal do you have to stay down within that forty-eight inches?

A. Yes, sir.

Q. 92. Now, I believe you work by the ton?

A. Yes, sir.

Q. 93. You get paid so much a ton?

A. Yes, sir.

Q. 94. At what time are you required to be at your working place ready to load coal?

A. At eight o'clock.

Q. 95. In the morning?

[fol. 495] A. Yes, sir.

Q. 96. Is it true you are paid based on the quantity of coal you load during the day.

A. Yes, sir.

Q. 97. In the process of your work, are you required to shoot the coal?

A. Yes, sir.

Q. 98. How is that done?

A. You have an augur that's about nine feet long or ten, something like that, and you bore these holes with these augurs.

Q. 99. By hand power?

A. Yes, sir.

Q. 100. How long does it take you to bore one hole?

A. If you work right hard, you might bore one in ten minutes.

Q. 101. Can you bore one in a minute or two?

A. Oh, no.

Q. 102. You have been boring these holes for several years?

A. Yes, sir.

Q. 103. How many holes do you have to bore, more than one?

A. If you are working in a room, you bore three holes.

Q. 104. After you get them bored, what do you do?

A. You tamp the powder in them.

Q. 105. Put the powder in it first?

A. Yes, sir.

Q. 106. And tamp it?

A. Yes, sir.

[fol. 496] Q. 107. Do you shoot all three holes at the same time?

A. No, sir, one at a time.

Q. 108. Do you generally shoot one hole and load or shoot one hole and then another before you start to load?

A. That all depends. Generally, we shoot all three while we are shooting.

Q. 109. What is the process of exploding that powder?

A. We have a cable, these detonators have a wire about ten feet long, two wires, and we fasten our detonators to these two wires and go back down the breakthrough and apply the battery to the detonator and that puts off the shot.

Q. 110. When that goes off, is any coal dust suspended in the air?

A. Yes, sir.

Q. 111. Is it thick?

A. Yes; sir, coal dust and smoke together.

Q. 112. Then I take it you work there the rest of the day?

A. Yes, sir.

Q. 113. Taking off thirty minutes for lunch?

A. A coal loader very seldom has any certain time to eat. He will eat between trips, get a car or two cars, and load them and eat while we are waiting on another car.

Q. 114. Eat when you won't lose any work time?

A. Yes, sir.

Q. 115. It may be morning or afternoon?

A. Yes, sir.

Q. 116. What time do you quit work?

A. Quit work at three-thirty.

Q. 117. When you quit work, where do you go?

[fol. 497] A. Back to the man-station.

Q. 118. What do you do there?

A. Get our tools together and pile them up. We did have to lock them up when they was double-shifting, but now we pile them up.

Q. 119. In a convenient place in the room where you are working?

A. Yes, sir.

Q. 120. Where you can get them the next day?

A. Yes, sir.

Q. 121. Suppose you had tools that needed repair?

A. We take them out.

Q. 122. Do you walk the nine hundred feet back to the man station?

A. Yes, sir.

Q. 123. Then what do you do when you get back there?

A. Our section boss is generally there, and he asks us how many cars we loaded and asks us if we want any powder, if so, how much, and he puts it down.

Q. 124. You mean he asks how much powder you will need for the next day?

A. Yes, sir.

Q. 125. Suppose you say "I want three sticks tomorrow" and turn in your bag that's empty, who puts them in?

A. They have the powder men that comes around at night.

Q. 126. So when you get your bag back the next day, it will have the number of sticks and detonators you have ordered the evening before?

[fol. 498] A. Yes, sir.

Q. 127. You wait there for the man-trip?

A. Yes, sir.

Q. 128. When the man-trip comes, you get in, I take it, along with the other men in your section?

A. Yes, sir.

Q. 129. And are carried out by the same kind of motor that brought you in?

A. Well, no, sir, not at that time. This motor would take us up to where the tram comes down.

Q. 130. Up to the main line?

A. Yes, sir, and we are set off there and set there in those cars until the tram comes along and picks us up.

Q. 131. In other words, you reverse the process of going in?

A. Yes, sir.

Q. 132. The main tram comes along and moves to another section and picks up some more men?

A. Yes, sir.

Q. 133. Until you finally get back out. I believe you said you started in the mine at approximately seven o'clock?

A. That's right.

Q. 134. At that time, how many man-trips went into No. 1 mine,—more than one or was it two?

A. Three, I believe.

Q. 135. On an average, about what time did you get out of the mine in the afternoon?

A. It would vary from four-thirty to five o'clock.

Q. 136. Go in at approximately seven or a little after and [fol. 499] get out from four-thirty to five?

A. Yes, sir. Generally around four-thirty.

Q. 137. You were paid for the actual coal loaded at the face of the mine?

A. That's right.

Q. 138. Suppose you had some tools with you, what would you do with them when you came out?

A. I would take the tools down to the blacksmith shop and tie my check to it and leave it there for the man to fix that evening.

Q. 139. Which would be the tools you would pick up the next morning?

A. Yes, sir.

Q. 140. Now, that is the section of the mine you work in, are you bothered with bad odors?

A. Yes, sir, very much.

Q. 141. What is the customary sanitation opportunities in a mine?

A. We don't have any.

Q. 142. The men just use the worked out places?

A. Yes, sir, just any place they can get. They can't go in a worked out place, because when a place is completed, it falls in. Sometimes, before it is completed, it falls in.

Q. 143. You mean when the pillars are completed?

A. Yes, sir.

Q. 144. Until the pillars are completed, is it considered to be a worked out place?

A. Yes, sir.

[fol. 500] Q. 145. Is it obnoxious?

A. Yes, sir, pretty bad. I pull what they call the chain pillars and where these other men go out, I have to pull these pillars back.

Q. 146. Are you bothered with gnats in the mine?

A. Yes, sir, we have plenty of them.

Q. 147. Do you just have a few of them or would you say a great number of them?

A. There is a great number of them.

Q. 148. During what season of the year do you have gnats?

A. Have gnats all the time.

Q. 149. Forever with you?

A. Yes, sir.

Q. 150. Are they any worse one season than the other?

A. No, sir, I haven't missed any of them.

Q. 151. When you eat your lunch, do those gnats cause you any bother?

A. Oh, yes.

Q. 152. Disturb you when you are eating your lunch?

A. Yes, sir, you have to keep them knocked off; they will gather about your light.

Q. 153. You keep your lamp on all the time?

A. Yes, sir.

Q. 154. And these lamps attract the gnats?

A. Yes, sir.

Q. 155. How about your food; does it attract gnats, too?

A. Yes, sir.

Q. 156. Do you know where these gnats breed?

[fol. 501] By the Court: That's getting pretty far afield, when we go to breeding gnats.

Q. 157. The gnats are present, are they not?

A. Yes, sir.

Q. 158. Is there any danger atached to this man-trip?

A. Oh, yes, sir.

Q. 159. In what way, Mr. White?

A. Well, there is danger in rocks.

Q. 160. Have you ever been on a man-trip when it wrecked?

A. Yes, sir.

Q. 161. More than once?

A. Yes, sir.

Q. 162. Have you ever been hurt on a man trip?

A. No, sir.

Q. 163. Do you know of any other men who have been hurt on man-trips?

A. There have been a few hurt there, claimed they was hurt on a man-trip.

Q. 164. Can you name some of them?

A. A fellow named Red McHone, I believe, he hurt his back, and a fellow named Carner Fox, he hurt his ribs, couldn't get the car stopped.

Q. 165. Do you know of any others that have been hurt on man-trips?

A. None that I have heard of. I haven't seen any.

Q. 166. Have you heard of any others?

A. Yes, sir.

Q. 167. Name some of the others?

[fol. 502] A. I'm sorry, I don't believe I can recall their names.

Q. 168. Do you know the occasion so as to describe it?

A. No, sir.

Q. 169. In walking from your man-station to your work room, do you have to watch out for that trolley wire that you spoke of?

A. Yes, sir, some times.

Q. 170. Do you have a trolley wire most of the way?

A. We have a trolley wire most of the way but we walk on the other side, the opposite side of the track from the wire.

Q. 171. Do you know whether the voltage in that trolley wire is sufficient to hurt you if you come in contact with it?

A. Yes, sir, there has been a few killed that way.

Q. 172. Will it knock you down?

A. Yes, sir.

Q. 173. Have you ever come in contact with it?

A. Yes, sir, I have been in contact with it.

Q. 174. What will it do to you?

A. It's something a fellow can hardly explain. Of course, it didn't knock me down.

Q. 175. But it is not a comfortable feeling?

A. No, sir.

Q. 176. What kind of light do you have in the mine? How is it lighted?

A. Electric lights, by battery.

Q. 177. You mean that's the one that you carry on your head?

A. Yes, sir.

Q. 178. How about the electric system of the mine?

A. They have lights along the main line probably every one or two hundred feet, something like that.

Q. 179. Do those lights go up to the room where you work?

[fol. 503] A. No, sir.

Q. 180. How far away from your room do they stop?

A. They stop about nine thousand feet or something like that.

Q. 181. Do you mean nine thousand or nine hundred?

A. About nine thousand.

Q. 182. And in that nine thousand feet, the only light you have is the one on your cap?

A. Yes, sir.

Q. 183. I asked you about the injuries on the main man-trip. Do you know of any one injured while walking from the man-trips to the working rooms?

A. No, sir, I don't know of any one.

Q. 184. Going back and forth?

A. No, sir.

Q. 185. State whether or not the section foremen, while on these man-trips, gives any direction to his men as to what they shall do during the day?

A. Oh, yes, sir. He will tell you, if you have worked out of a place, and you don't have any certain place to work in, and he will tell you to go work with such and such a fellow.

Q. 186. Do I understand that he does give directions on these trips?

A. Yes, sir.

Q. 187. Has he given you directions on it?

A. Yes, sir.

Q. 188. On your way out, when you finish your day's work, does the section foreman give directions at times as to what shall be done the next day?

A. Yes, sir, some times.

[fol. 504] Q. 189. When you reach your room where you are going to work, are you able to go to work immediately loading coal?

A. No, sir. It takes a good two hours to get ready to start loading coal.

Q. 190. What do you do during that time?

A. Well, we have to move these machine cuttings.

Q. 191. Is that the bug-dust they talk about?

A. Yes, sir.

Q. 192. How is that removed?

A. With a long-handle shovel about ten feet long, out from under the cut; take it out with that shovel and throw it away with another.

Q. 193. Is that bug dust sent on the outside?

A. No, sir, it is piled up in there.

Q. 194. After you get the bug dust removed, what do you do?

A. When we get the bug dust removed, we bore our holes or set what we call safety pieces.

Q. 195. What are safety pieces?

A. Two pieces we set generally on each side of the car for protection.

Q. 196. Do you have to set pieces up where the machine was cutting?

A. On pillars you are constantly timbering in any spare time you have.

Q. 197. How about sounding the roof?

A. Oh, yes, that's the first thing a man does when he goes in his place.

Q. 198. Is that a constant process during the day?

[fol. 505] A. Yes, sir.

Q. 199. Do you work part time on your knees?

A. Yes, sir, I do.

Q. 200. In going to your working place, do you have to go on your knees any of the time?

A. No, sir, a man don't have to get down on his knees. He can walk very well.

Q. 201. Is there any difference in your knees by reason of you working on your knees?

A. Yes, sir.

Q. 202. Do you mind showing them to us?

A. (Displaying his knees): That one beeled.

Q. 203. How about the other one?

A. The other one is normal.

Q. 204. Is that condition unusual in miners?

A. No, sir. Your Honor, I have a correction to make in my statement. Instead of, Senator asked me what was the last light. It's nine hundred feet instead of nine thousand.

Cross-examination.

By Mr. Stuart:

Q. 1. Mr. White, you said you are paid on a tonnage basis. How many tons, on an average, do you load a day?

A. It will average about twelve tons a day, something like that. It will run higher one day and lower the next.

Q. 2. In addition to what you are paid for loading the coal, you are also paid yardage for the rock that comes, I believe?

A. Yes, sir.

[fol. 506] Q. 3. Now, going to your trip in on the man-trip, you spoke of having found six inches of snow in a car. You don't mean that is something that happens often, do you?

A. Well, no, sir, you wouldn't find six inches of snow in them often but every time it snows, we have snow in the cars.

Q. 4. The car that you rode in has always been sitting outside in the weather just before you rode in, has it?

A. Yes, sir.

Q. 5. Except on one night in the week, aren't the cars usually used in the night shift?

A. Yes, sir, they are usually used in the night shift, but when they get through with them at the tipple, they leave them setting on the main line and they take what weather may come.

Q. 6. That's not very long, is it?

A. I don't know what time they come out.

Q. 7. You don't mean that you sit down in that six inches of snow when you find it there?

A. No, sir, I generally carry something in my pocket to ride on. If I didn't I would have to sit in it.

Q. 8. You wouldn't think about scraping it off before you sat down?

A. You could take your foot and scrape it off, but still it's in the car.

Q. 9. Does the foreman ride in the same sort of car the rest of you do?

A. Yes, sir.

Q. 10. You spoke of the supervision which you had on the man-trip. You said if one of you got in the wrong car, the foreman would probably call your attention to that?

[fol. 507] A. Yes, sir.

Q. 11. And if one of you sat down on the side next to the trolley wire, your attention would probably be called to that?

A. Yes, sir.

Q. 12. And that if so many of you got in one car as to crowd it, the foreman would probably say something about that?

A. Yes, sir.

Q. 13. You know the Federal Bureau of Mines makes inspections of the mines, don't you? Federal men come there, you know?

A. Yes, sir, I have seen them there one time, I believe.

Q. 14. Did you know that the Federal Inspection Standards that the Federal Bureau of Mines provides contains this in Rule 60: When riding in a car on a trolly-haulage road, men should ride on the side of the car opposite the trolley wire, if there is any danger of men coming in contact with the wire?

A. I knowed it was a rule; I knowed it was the law.

Q. 15. There are some other things the foreman looks out for when you are riding those man-trips, too,—they never allow the men to ride on the rear bumper or between the cars, do they.

A. No, sir.

Q. 16. You know there is a Federal regulation on that which reads: No person other than the brakeman should be permitted to ride on the rear bumper of a man-trip and no person should be allowed to ride between cars?

A. That's right.

Q. 17. Then, if men start getting off the trip before it stops, the foreman is apt to tell them not to do that?

A. Yes, sir.

[fol. 508] Q. 18. Rule 62: The man trip should come to a full stop before men load and unload?

A. Yes, sir, I knew it was against the law.

Q. 19. Then there is another item which you didn't mention in your testimony, and that's about the car the tools are hauled in. No men are allowed to ride in that car?

A. No, sir.

Q. 20. And Federal Rule No. 64 says this on that: No material except tools and other supplies that can fit inside a separate car should be hauled on man-trips?

A. I never did read the Federal Rules, but I knew it was the law.

Q. 21. And on that same subject, Rule 65 says: A car shall be provided for tools and tools should not be permitted in any man-trip in the cars with the men?
A. Yes, sir.

Redirect examination.

By Senator Muse:

Q. 1. The section foreman, if you v-olate one of the rules of the Company on this man-trip does he at the time give you a discipline slip?
A. I have heard of it, but he has never given me one.
Q. 2. Do you know that he does do that?
A. Yes, sir.

Witness stands aside.

[fol. 509] H. D. Hampton, another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Senator Muse:

Q. 1. You are Mr. H. D. Hampton?
A. Yes, sir.
Q. 2. You are employed by the Jewell Ridge Coal Corporation?
A. Yes, sir.
Q. 3. Are you an officer in the Union?
A. Yes, sir.
Q. 4. What is your position?
A. President of my Local Union.
Q. 5. What's that Local Number?
A. Sixty-one sixty-seven.
Q. 6. Are you also one of the names defendants?
A. Yes, sir.
Q. 7. How long have you been working at Jewell Ridge?
A. I went to work at Jewel Ridge in 1921.
Q. 8. What as,—as a coal loader?
A. Yes, sir.
Q. 9. Are you now a coal loader?
A. Yes, sir.

Q. 10. How long have you been working around mines?

A. About twenty-eight years.

Q. 11. How old are you?

A. Forty-seven.

Q. 12. In what section do you work in Jewell Ridge?

A. First North Straight.

[fol. 510] Q. 13. That's approximately how far from the portal?

A. About four and a half miles, in my judgment.

Q. 14. Were you in the court room when Mr. W. S. White testified?

A. Yes, sir.

Q. 15. Did you hear his evidence?

A. Yes, sir.

Q. 16. Do you know Mr. White?

A. Yes, sir.

Q. 17. Is your routine as a coal loader similar to that of Mr. White's?

A. Yes, sir, practically the same, except he works in pillars and I work in a room.

Q. 18. With that exception is your experience as a coal loader the same as he has testified to?

A. Yes, sir.

Q. 19. You also ride the man-trips?

A. Yes, sir.

Q. 20. Are those man-trips dangerous or not, Mr. Hampton?

A. Yes, sir, I consider them dangerous.

Q. 21. Have you ever been hurt on one?

A. No, sir.

Q. 22. Do you know of any men who have been hurt on man-trips at this mine?

A. Yes, sir.

Q. 23. Will you name some of them.

A. I have the names of four I call to memory very easy. I have one here—two men—my two first men, that was [fol. 511] killed on a short man-trip. This first one was a foreigner, I remember his name as Dominic,—I am sure Mr. St. Clair remembers him, and Tim Yegan,—to the best of my knowledge, he was a brakeman. Those two were killed, and he mentioned Corner Fox.

Q. 24. You mean Mr. White did?

A. Yes, sir, and George Whitt. We were going in one morning and the car wrecked and some way he got one of his fingers, I disremember which one it was, but I believe it was this finger, mashed very bad. I think he lost from three to four weeks with that finger, and Red McHone, as Mr. White quoted him, he didn't lose any time, but he got jarred up pretty bad.

Q. 25. What kind of wreck was he in?

A. In the man-trip when a car wrecked and Mr. Fox lost a day after he went in there. He felt like he wasn't able to work and went back home.

Q. 26. How was he hurt?

A. In the same wreck Mr. McHone was hurt.

Q. 27. Did you know all those men who were hurt?

A. Yes, sir, all but Yeagans, I don't recall his name by Yeagens, only he was the brakeman with this fellow that I mentioned—if you will pardon me—but personally I wasn't acquainted with him, just knowing him as a brakeman.

Q. 28. The section you work in, does this man-trip go out on the outside or along through a cut and travel for some distance on the outside?

A. Yes, sir.

Q. 29. More than once?

[fol. 512] A. Just one time.

Q. 30. What distance does it travel on the outside there?

A. That distance, in my judgment, is half a mile.

Q. 31. After you finish the day's work and get on that man-trip, what condition are you in? Are you sweaty and hot?

A. Yes, sir, a man working is sweaty and when he get in the man-trip, it's cold and chilly.

Q. 32. And when he comes out in that opening, he has to enter whatever weather is existing at that time?

A. Yes, sir, going in and coming out, too.

Q. 33. Do you use the same tools Mr. White described?

A. Yes, sir, except he left out our long-handled dust shovel.

Q. 34. He uses that, too?

A. Yes, sir.

Q. 35. But just forgot to name it. Mr. Hampton, these man-trips, do they come out of the mine—do you get out of the mine as fast as you go in, as they take you in?

A. No, sir.

Q. 36. Why is that?

A. Under the conditions of the trams hauling loads to the tipple and empties back to the sidetracks.

Q. 37. When you are going in, is the man-trip given priority over the trams hauling coal?

A. Yes, sir.

Q. 38. And when the day's work is over and you get ready to come out, are the trams hauling coal or the man-trips given priority?

[fol. 513] A. The trams are hauling coal and some times we have to wait at the sidetrack until a trip of empties comes up from a distance.

Q. 39. Does that happen very frequently or just now and then?

A. Right often.

Q. 40. Would you say during the period from April 1st up to recently that it took more time to get from the man-station to the outside than it did from the outside to your man-station?

A. Yes, sir.

Q. 41. The section you work in, about how long does it take to ride in?

A. Nine and a half to ten hours.

Q. 42. You misunderstood the question. You get to the mine at what time?

A. About seven o'clock.

Q. 43. And get out of the mine at what time?

A. Four-thirty and five.

Q. 44. Do all the men come out at the same time?

A. As nigh as possible.

Q. 45. All riding the same man-trip come out together?

A. Yes, but possibly there will be a man-trip held up some where.

Q. 46. Are those man-trips held up for the section foreman to make off his records?

A. Yes, sir, I have set and waited numerous times for the section foreman to make up his records.

Q. 47. So far as you know, was there any reason he [fol. 514] couldn't have made his records up outside?

A. They have an office for that purpose.

Q. 48. I believe recently over there the man-trips going in and coming out have been changed?

A. Yes, sir.

Q. 49. You heard Mr. Hagy testify two or three days ago?

A. Yes, sir.

Q. 50. Is his explanation of the way the man-trips are handled now correct?

A. Yes, sir, I think it was.

Q. 51. If you leave at seven o'clock in the morning, Mr. Hampton, or thereabouts, what time do you get to your working place usually?

A. About ten until eight usually.

Q. 52. Do you loiter on the way or go there directly, considering what you have to do?

A. We get there as quick as we possibly can get there, considering what all we have got to go through with.

Q. 53. In other words, it takes you approximately fifty minutes to get to your working place from the time you leave the outside?

A. Yes, sir.

Q. 54. What is the condition of the walkway in the section of the mine you go to after you leave the man-station?

A. It's rather low.

Q. 55. How high is it?

A. About four feet.

Q. 56. How far do you have to walk after you leave your [fol. 515] man-station to your working place?

A. It takes me about eight minutes from the man-station to the face of my place.

Q. 57. About how many feet would you think that was?

A. About nine hundred or nine hundred and fifty, I would think.

Q. 58. In walking that distance, do you walk erect or stooped over?

A. Stooped over.

Q. 59. You carry your dinner bucket and tools?

A. Yes, sir.

Q. 60. How do you carry them?

A. If I just have my dinner bucket, I swing it behind me like that, and if I have my pick and dinner bucket and powder sack, I carry them like that.

Q. 61. If you have to use two hands, you put them down like that, otherwise, you brace yourself?

A. Yes, sir.

Q. 62. Do you have any particular walk-way from where you leave your man-station or is it rough?

A. It is reasonably rough where the coal has fell off the cars on each side of the track.

Q. 63. Do you walk on the ties of the track, between the rails of the track or get off to one side?

A. Generally, we walk on the side of the track.

Q. 64. The side of the track away from the electric wire?

A. Yes, sir, on the opposite side.

Q. 65. How much clearance do you have there, Mr. Hampton?

[fol. 516] A. Some places we don't have so very much clearance and other places, the clearance is all right.

Q. 66. Describe where you don't have much clearance?

A. The spaces I spoke, mentioning we don't have much clearance is meaning it would be dangerous if you tried to stand against the rib for a trip to pass, more than likely you would get cripped.

Q. 67. Because of the space not being wide enough?

A. Yes, sir.

Q. 68. While you are walking that distance, do you have to keep a lookout for approaching trams?

A. Oh, yes, sir.

Q. 69. Do they actually approach you and pass?

A. Yes, sir, the gathering motors.

Q. 70. What do you do if you see a motor approaching?

A. We get a little more pep up and get in the clear.

Q. 71. Do those trams have a light on them?

A. Oh, yes.

Q. 72. And you have a light on your hat?

A. Yes, sir.

Q. 73. Is your part of the mine lighted or do you have to rely entirely on the light from your hat?

A. Down on that part of the section, after you leave the main haulage, excepting where there is switches and derails, you use your light in particular.

Q. 74. About how far are you walking from the closest electric light?

A. I don't know just exactly what that would be. I might [fol. 517] guess at it and might hit it or miss it. I would say about nine hundred and fifty feet, or something like that, might be more.

Q. 75. When you finish your day's work, you reverse your process to get back to the man-station?

A. I do.

Q. 76. How long does it take you to wash up after the day's work is over?

A. It usually takes me about thirty minutes.

Q. 77. Do you get dirty in that mine?

A. Yes, sir.

Q. 78. Does it take you thirty minutes of good scrubbing?

A. It certainly does.

By Mr. Stuart: We would like our same objection to apply to the dirt, also, Your Honor?

By the Court: That objection is considered.

Cross-examination.

By Mr. Stuart:

Q. 1. Where do you live, Mr. Hampton?

A. Baptist Valley; my address is Cedar Bluff, Virginia.

Q. 2. How far is your home from the mine where you work?

A. About seventeen or eighteen miles.

Q. 3. How do you get back and forth?

A. We ride the truck, me and my boy, and he hauls men to the mines.

Q. 4. You mean your son runs one of the trucks to haul men under contract with the company?

A. Yes, sir.

[fol. 518] Q. 5. Now, you expressed the opinion, Mr. Hampton, that the man-trips are dangerous and you mentioned two men who had been killed. Were both of them killed in the same accident?

A. Yes, sir.

Q. 6. Where was that?

A. That was on what is called Jones Fork.

Q. 7. That was at Jewell Ridge?

A. Yes, sir.

Q. 8. How long ago was that?

A. I can't recall the number of years but I think it was probably back in 1935, but I am not positive.

Q. 9. You think it was about eight years ago?

A. Yes, something like that. To make that clear, I would like to say I don't positive know. I haven't kept a record of just the number of years but I was working at Jewell Ridge when it happened and know it actually happened.

Q. 10. You have been working at Jewell Rridge, you said, ever since 1921?

A. Yes, sir, with the exception of a time or two. I would quit and go away for a short space of time, I believe twice during that time.

Q. 11. And this accident when these two men were killed happened a good many years ago?

A. Yes, sir.

Q. 12. Were you on the man-trip yourself when the men were killed?

A. No, sir.

Q. 13. You don't know anything about it except what you have heard?

[fol. 519] A. I know it happened and know our men was killed.

Q. 14. These other three men you mentioned, Mr. Fox and Mr. Whitt and Mr. McHone, how many of them lost any time?

A. Mr. Fox lost one day; Mr. McHone didn't lose any time, and Mr. Whitt lost three or four weeks, I don't know, probably more, right in that neighborhood, of time.

Q. 15. Mr. Hampton, you said you were president of the local of the United Mine Workers there at Jewell Ridge. You have a closed shop contract there with the Company, have you not?

A. Union Shop, we call it.

Q. 16. This truck that you ride in, what do you sit on in that truck?

A. We have a bench.

Q. 17. It's an ordinary pick-up truck?

A. Yes, sir.

Q. 18. With a sort of roof built over it, is it?

A. Yes, sir, we have what we call a cab.

Redirect examination.

By Senator Muse:

Q. 1. One question I should have asked you in chief: During the time you are riding on this man-trip, does your section boss give instructions to the men as to the work?

A. Some times he does, yes, sir.

Q. 2. Is that both going in and coming out?

A. Yes, sir.

Recross-examination.

By Mr. Stuart:

Q. 1. Mr. Hampton, you don't mean by that that the [fol. 520] foreman instructs you as to work to do while you are on the man-trip, do you?

A. Yes, sir, I mean by that in this way, some times he will tell a man a different place he would like for him to work the next day or something like that.

Q. 2. You don't mean that he tells them something in the way of work on the man-trip, while the man-trip is going,—it is that the work is to be done at their working place, isn't it?

A. Nothing only giving them orders about safety rules.

Q. 3. If he gives them orders, he is talking about work for them to do when they get to their working place, isn't he?

A. Certainly so.

Q. 4. You spoke of the lack of clearance at some points between your man-station and your place of work. Have you ever been caught and injured in such a place by a passing motor?

A. No, sir, I haven't.

Witness stands aside.

John Kerr, another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Senator Muse:

Q. 1. You are Mr. John Kerr?

A. Yes, sir.

Q. 2. I believe you are employed by Jewell Ridge Coal Corporation at No. 1 Mine?

A. Yes, sir.

Q. 3. As a coal loader?

A. Yes, sir.

[fol. 521] Q. 4. You heard Mr. White and Mr. Hampton testify, I take it?

A. Yes, sir.

Q. 5. Do you get into the mine and get out in substantially the same way they do?

A. Yes, sir, that's the only way we have of getting in and out.

Q. 6. You ride the same man-trip?

A. Yes, sir.

Q. 7. What section of the mine do you work in?

A. First North Straight.

Q. 8. That's approximately how far from the main entrance?

A. Around four and a half miles in, the best I could judge. I couldn't say the exact distance.

Q. 9. Have you ever been hurt on one of these man-trips?

A. No, sir.

Q. 10. Have you ever been hurt in the mine?

A. Yes, sir.

Q. 11. How were you hurt?

A. I have been injured in the mines two or three different ways.

Q. 12. You have a scar on your neck. How did you get that?

A. I got that scar while running a motor on second north.

Q. 13. A gathering motor?

A. Yes, sir.

Q. 14. What happened?

A. I was pulling coal from second north straight and [fol. 522] I brought my trip up and set it in and John Day brought his coal out of first, second and third right, and he asked me to couple on and as we dropped back from dropping his trip in, the slate fell and broke the trolley wire and caught me across the neck right here.

Q. 15. Did it knock you unconscious?

A. Yes, sir.

Q. 16. Did you lose any time?

A. No, sir, I didn't make off any accident report.

Q. 17. When was that?

A. That was along in June of this year, if I am not mistaken.

Q. 18. Do some of the man-trips go over that track?

A. Yes, sir, we made up a man-trip right under that rock every day.

Q. 19. And it fell on you?

A. Yes, sir.

Q. 20. You missed the rock?

A. Yes, sir, approximately three feet.

Q. 21. You are now a coal loader?

A. Yes, sir.

Q. 22. On the man-trips you ride, does the section foreman give instructions to the men concerning their work?

A. At various times, he does.

Q. 23. When you get to the man-station in your section, how far do you have to walk over to your working room?

A. I have to talk approximately a thousand feet to where my regular working place is.

[fol. 523] Q. 24. What is the height of the roof where you walk there?

A. Around forty-six to forty-eight inches.

Q. 25. In walking, is it necessary for you to keep down that far below the surface of the top?

A. Yes, sir.

Q. 26. Does that require you to walk in a stooped-over position?

A. Yes, sir.

Q. 27. How far is the closest electric light from your working room, would you say?

A. It would be approximately fifteen hundred feet from where my regular working place is.

Q. 28. I take it you get your powder and detonators the same as Mr. White testified?

A. Yes, sir, in the same location.

Q. 29. The same routine exactly?

A. Yes, sir.

Q. 30. In walking that distance, are you guided mainly by the light in your hat?

A. Yes, sir, that's the only light we have.

Q. 31. Do these lights ever go out?

A. Some times.

Q. 32. What do you do when they go out?

A. We have to wait until some one comes by with a light or the motor comes by with a light, and he will bring us another light. We have a spare at the man-station.

Q. 33. What kind of working surface do you have?

A. We have the plain ground where the coal has been [fol. 524] mined there.

Q. 34. Is it smooth or does the coal drop off there at times?

A. We have coal from the cars and that what's fell from the roof.

Q. 35. Is it rough?

A. Yes, sir.

Q. 36. Do you have to keep your light on it to see the condition?

A. Yes, sir.

Q. 37. How wide is the space you walk in?

A. It will vary; some places four feet; others it won't be over thirty inches. It won't be over that.

Q. 38. Is there always room for you to squeeze over against the side wall for him to pass?

A. It will vary. There is places you do have and places you don't have.

Q. 39. Do these motors have lights on them?

A. Yes, sir.

Q. 40. If you are walking in a narrow place where the motor can't pass you without hurting you, what do you do?

A. Quite naturally, I try to get out of the way.

Q. 41. Have you always been able to do that so far?

A. Yes, sir.

Q. 42. When you reach the room, how long before you start loading coal?

A. It varies. Some days you have the cut to clean and make preparation and other days we won't.

[fol. 525] Q. 43. Some days you have to do more timbering?

A. Yes, sir. You see I work pillar work all the time and some days I have nothing to do and will go back to a room.

Q. 44. Some of that pillar work is cut by machine and some by hand, is it?

A. Yes, sir.

Q. 45. Getting out of the mine is about the same process Mr. White testified about, is it?

A. Yes, sir.

Q. 46. You use the same tools he uses?

A. Yes, sir.

Q. 47. And bring them back and forth to be sharpened like they do?

A. Yes, sir.

No Cross-examination.

Witness stands aside.

JOHN FRANKLIN, another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Senator Muse:

Q. 1. You are John Franklin?
A. Yes, sir.
Q. 2. You work for the Jewell Ridge Coal Mining Company?
A. Yes, sir.
Q. 3. At its No. 1 Mine?
A. Yes, sir.
Q. 4. You are a coal loader, I believe?
[fol. 526] A. Yes, sir.
Q. 5. How long have you been working around mines, John?
A. About thirty-five years.
Q. 6. In what section do you work in?
A. Parallel Number Eleven.
Q. 7. Parallel Section?
A. Yes, sir.
Q. 8. That's one of the furthest sections, I believe, from the portal?
A. Yes, sir.
Q. 9. How far back in there is it to where you work, the best you can guess?
A. I would say around six and a half miles.
Q. 10. It seems like a long distance back there, does it?
A. Yes, sir.
Q. 11. You have heard Mr. White and these other men testify. Do you get in the mine and come out about like they do?
A. Yes, sir.
Q. 12. You ride the same man-trips?
A. Yes, sir.
Q. 13. And get your powder the same way?
A. Yes, sir.
Q. 14. Carry the same tools?
A. Yes, sir.
Q. 15. How far do you have to walk from your man-station back to your working room, approximately?

A. I would say between three and four thousand feet from the man-station.

[fol. 527] Q. 16. You have to walk that far?

A. From the man-station, yes, sir.

Q. 17. You get off at the man-station?

A. Yes, sir.

Q. 18. You have to walk as far as three thousand feet?

A. Yes, sir.

Q. 19. How long does it take you to walk it, John?

A. Fifteen minutes.

Q. 20. You can't walk three thousand feet in fifteen minutes, can you?—Any way, whatever distance it is, you walk it?

A. Yes, sir.

Q. 21. In what position do you walk it?

A. Some times bent over and some times practically straight up.

Q. 22. Do you walk much of that distance bent over?

A. Most of it in the section where I work is straight up.

Q. 23. How far do you have to walk bent over?

A. I imagine five or six hundred feet; something like that.

Q. 24. You have the same tools these other men have?

A. Yes, sir.

Q. 25. John, does the section foreman give instructions to the men as to their work while on these man-trips?

A. Some times, yes, sir.

Q. 26. You have to take your tools out and have them sharpened like the other men?

[fol. 528] A. Yes, sir.

Q. 27. The distance you are walking from your man-station back to where you work, what kind of surface do you have to walk on? Is it smooth or rough?

A. You have to go down the main line four hundred and some feet and it's pretty clear by the side of the track and then it's kind of rough on up to my work place.

Q. 28. Lumps of coal and slate on the side?

A. Yes, sir.

Q. 29. What kind of clearance do you have between the track and the side wall?

A. I would say between five and four feet in some places.

Q. 30. Do you always have room enough for the motor to pass you?

A. Yes, sir.

Q. 31. You are not bothered on your section with the motor passing?

A. No, sir.

Q. 32. Have you ever been hurt on a man-trip, John?

A. No, sir.

Q. 35. Do you know of anybody being hurt on a man-trip that we haven't asked about today?

A. Yes, sir.

Q. 34. Who?

A. Mr. Webb got his lip cut in a man-trip wreck.

Q. 35. How long ago has that been?

A. I guess it's been possibly two months ago.

Q. 36. How was his lip cut, John, do you know?

[fol. 529] A. He fell or tripped, some way, and fell.

Q. 37. Did you see his mouth bleeding?

A. Yes, sir.

Q. 38. Was it cut on the man-trip?

A. Yes, sir.

Q. 39. The same man-trip you were on?

A. No, sir.

Q. 40. But you don't know exactly how it happened?

A. The man-trip hit another trip with a gathering motor between them.

Q. 41. You mean two sections ran together?

A. No, there was a coal trip and a gathering motor hit the coal trip and it hit it.

Q. 42. The man-trip ran into something.

A. Yes, sir, it ran into a trip of coal and a gathering motor.

Q. 43. The man-trip ran into a trip of coal that had a gathering motor on it?

A. Between it.

Q. 44. Do you know of any one else who got hurt?

A. Randolph Haynes had a jar of milk.

Q. 45. What happened, did he drink it?

A. It busted and cut him all over the face.

Q. 46. I believe that was a violation of the rules to have anything glass on that man-trip, wasn't it?

A. Yes, sir, wherever I worked at, they had a rule that no man should carry glass in the mines.

Q. 47. And this particular man did and got cut with it?

A. Yes, sir.

[fol. 530] Cross-examination.

By Mr. Stuart:

Q. 1. John, you say your section was parallel?

A. Yes, sir.

Q. 2. And you say that's three thousand to four thousand feet from the entrance to the mine?

A. No, sir, from the man-station.

Q. 3. You say your section is three or four thousand feet from your man-station?

A. Between three and four thousand feet to my working place.

Q. 4. You never measured it, I guess, did you?

A. I just suggested that. I didn't measure it.

Q. 5. That's your best suggestion?

A. I judged by the time it takes me to walk it.

Q. 6. If the man shows something different, you are not going to argue with the map, are you?

A. You can't argue with figures.

Q. 7. You say your section is about six and a half miles from the outside of the mine?

A. From the outside portal, that's what I suggested.

Q. 8. And the same thing about your never having measured the other place applies to that, too, does it?

A. I have walked it many a time.

Q. 9. You have walked the whole six and one-half miles many a time?

A. Yes, sir.

Q. 10. Why did you do that?

[fol. 531] A. Didn't have anything to do and got my bucket and lit out and timed myself to the lamp house.

Q. 11. You mean when you finished the day's work, you wouldn't wait on the man-trip, you just started out?

A. Yes, sir. If I didn't have anything to do when I went in there, I would get my bucket and come on back.

Q. 12. And your best estimate of that is six and one-half miles?

A. An hour and thirty-eight minutes to walk it.

Q. 13. You are a pretty good walker, aren't you, John?

A. Yes, sir.

Q. 14. That's doing a little better than four miles an hour, isn't it?

A. I don't know, but——

Q. 15. You must have a mighty smooth road and all the conditions for walking must be mighty good to make it in that, don't you reckon?

A. That's the time I would make it in. The best I could get.

Q. 16. All right, if the map shows it is less than that, you aren't going to argue with the map, though, are you?—You are a coal loader, you say, John?

A. Yes, sir.

Q. 17. You are paid on the number of tons you load?

A. Yes, sir.

Q. 18. So much a ton?

A. Yes, sir.

Q. 19. In the quarter ending June 30th this year, you got [fol. 532] an average of $11.02 a shift, didn't you, for loading coal?

A. Well, yes, sir, about that.

Witness stands aside.

JIMPER BARTLEY, another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Senator Muse:

Q. 1. You are Mr. Jimper Bartley?

A. Yes, sir.

Q. 2. I believe you are also employed by the Jewell Ridge Coal Mining Company?

A. Yes, sir, Jewell Ridge Coal Corporation, No. 1 mine.

Q. 3. How long have you been working there, Mr. Bartley?

A. I believe I went back to Jewell Ridge this last time about the 7th or 8th of December 1940.

Q. 4. Had you worked there before?

A. Yes, sir, I went there in 1935.

Q. 5. How long have you worked in and around coal mines?

A. Approximately twenty-two years.

Q. 6. How old are you?

A. Thirty-eight.

Q. 7. You went in the mines when you were about sixteen?

A. Yes, sir.

Q. 8. I believe you are what is known as a motorman?

A. I operate a gathering motor.

Q. 9. What do you do with a gathering motor?

A. I gather loaded cars and bring them to the sidetrack and take empties back to the places for the men.

[fol. 533] Q. 10. You gather up the loaded cars in your section that you work in?

A. Yes, sir.

Q. 11. What section do you work in?

A. Gravel Creek.

Q. 12. Do you also take empty cars to the men working in Gravel Creek?

A. Yes, sir.

Q. 13. And you take these loaded cars out to the main track?

A. Yes, sir, and put them in the coal hole out there.

Q. 14. Where they are picked up by the main tram?

A. Yes, sir.

Q. 15. Before you go inside, take your morning routine, what time do you get to your place of work?

A. I get to the lamp house by bus from Richlands at approximately six-thirty, maybe a little later, maybe a little earlier, and I get off the bus and get in line to get my light, and usually, as a rule, there are something like thirty or thirty-five men rides the bus and we can't all be first so we take it in turn to get in line to get our light. When I get up to the window to get my light, I deposit my check with my payroll number and get my lamp and then go to the oil house and get a can of oil to oil my motor with.

Q. 16. Where is the oil house with reference to the lamp house?

A. Across the main line track.

Q. 17. How much oil do you get?

[fol. 534] A. A quart of oil.

Q. 18. What do you get it in?

A. A feed can, we call it.

Q. 19. Do you use the same one, day after day?

A. Yes, sir.

Q. 20. Do you have a locker or something that you put it in?

A. Yes, sir.

Q. 21. I believe you have a locker you open from the outside and put your oil can in and the man in the oil-house opens it from the inside and puts the oil in?

A. Yes, sir.

Q. 22. So when you go to get your oil can in the morning, it is filled?

A. Yes, sir, most of the time.

Q. 23. What do you do then?

A. I go get my oil can and then I go up on what we call the yard where the tracks branches off around the shops.

Q. 24. Something like a yard on the railroad?

A. Something of a similar nature, and I hunt out the motor I operate during the shift.

Q. 25. Do you use the same motor each day?

A. Yes, sir.

Q. 26. Does it have a number on it?

A. Yes, sir.

Q. 27. Assuming your motor is No. 1——

A. It is No. 5;

Q. 28. What do you do with it?

[fol. 535] A. I get my oil and go up and get my motor and most of the time, I usually oil it pretty well where it is sitting.

Q. 29. Do you oil your motor every morning before you take it in?

A. I oil it every day once and some times twice. I may not oil it before I go in but I oil it once and some times twice a day.

Q. 30. Do you usually oil it before you go in?

A. Yes, sir.

Q. 31. Is that your general custom?

A. Yes, sir, with all motormen.

Q. 32. Then what do you do with it?

A. You make preparation to get that up towards where you start inside the mine.

Q. 33. Why don't you run it on up?

A. You can't do it all the time. I believe they have some where around seven or eight tram motors there, I haven't counted them, and maybe they are switched in on the track ahead of you.

Q. 34. Suppose you go over and find four motors sitting in front of your motor, what do you have to do?

A. If there is side track room or space where you can sidetrack these trams off ahead of you, you get them on the side track so it will turn you loose to get to the sand house.

Q. 35. After you have switched, if necessary, and gotten a clear track, what do you do?

A. Run the motor to the sand house and sand the motor up.

Q. 36. How many places does it have to be sanded?

[fol. 536] A. Four sand-boxes.

Q. 37. They hold how much?

A. I forget. Approximately two bushels of sand. They might not get that much.

Q. 38. But if all four places are empty, they hold that much?

A. Yes, sir.

Q. 39. Are they seldom all empty?

A. It's not very often they are all empty.

Q. 40. Do you have any equipment or tools that you carry in?

A. I have stationary tools that goes with the motor, that's what is called standard equipment on the motor. We have two retractors but they stay on all the time.

Q. 41. Do you have any tools that you have to put on for each trip before you go in?

A. No, sir, I do not.

Q. 42. Do you have a helper?

A. Yes, sir.

Q. 43. Who is your brakeman?

A. L. G. Wallace.

Q. 44. Does he help you oil and sand the motor, generally speaking?

A. He seldom ever helps me oil; he usually helps me sand up.

Q. 45. I believe you are in charge of the motor?

A. I am responsible for the motor.

Q. 46. After you have gotten your motor oiled and sanded, [fol. 537] what do you do with the motor?

A. After we have got the motor sanded up, and oiled up, we usually mess around and talk with the other men until time to start inside.

Q. 47. What time do you start in?

A. At seven o'clock. Maybe the man-trip will leave ahead of us and some times we go in ahead of the man-trip; according to how we switch out on the main line.

Q. 48. Do you more often go in behind them than in front of them?

A. More often we go in behind them.

Q. 49. After the man-trips have run, who gives you the order to go in?

A. The dispatcher or general mine foreman generally tells a man when he can start inside the mine. The motorman finds out before he starts in because he is afraid he might meet somebody coming out.

Q. 50. Do you find out from the dispatcher whether the track is clear?

A. Usually, yes, sir.

Q. 51. Is the dispatcher on the inside or outside of the mine?

A. He is always on the inside of the mine in the morning.

Q. 52. When you go into the mine under the direction of the dispatcher, for instance, does he give you a clearance all the way to your station or section or do you have to switch off from time to time?

A. You seldom have to switch off in the morning going [fol. 538] in; usually it's pretty direct through to your section in the morning.

Q. 53. Approximately, as best you can estimate, how far is it back to your section?

A. I would make an estimate of four, maybe four and a half miles; that's Gravel Creek.

Q. 54. When you get to Gravel Creek, you go to what portion of it?

A. That's all there are of it, there at that man-station.

Q. 55. Do you have a man-station at Gravel Creek?

A. Yes, sir.

Q. 56. Do you go to the man-station?

A. Yes, sir.

Q. 57. What do you do while you are there?

A. Usually, as a rule, I couple on to the back end of the empties when the tram pulls down, to let the man out, so he can go back out to the dispatcher's office and gather up a load of coal or something.

Q. 58. You get them out of the way so the tram can proceed ahead?

A. No, sir, so he can come back to the dispatcher's office.

Q. 59. So he can reverse his trip?

A. Yes, sir.

Q. 60. Do you place the empty cars for the miners working in your section?

A. Yes, sir.

[fol. 539] Q. 61. And when those cars are filled, you take them away?

A. Yes, sir.

Q. 62. What time of day does your pay start?

A. Eight o'clock.

Q. 63. And ends at what time?

A. Three-thirty.

Q. 64. You take off how much for lunch?

A. I take off thirty minutes; some times I use it and some times I don't use all of it.

Q. 65. At what place are you, usually, at eight o'clock?

A. Usually at my designated section.

Q. 66. At your man-station?

A. Yes, sir.

Q. 67. At three-thirty have you gotten back to your station or are you out on the section some where?

A. Some times I am up in the section, some times maybe I am a few minutes late if I happen to have a loaded car, where it has fallen in or something, I generally try to get it, regardless of whether it is quitting time or not.

Q. 68. You try to clean up?

A. I try to give them what cars they need and get them off from the dangerous places.

Q. 69. Do you try to leave a man a car so he can start the next morning?

A. No, sir, I do not, unless it is in a room where it might fall in. We have orders not to leave cars on pillars. You may have the top fall in on it or have what is known as a [fol. 540] pillar fall.

Q. 70. And the coal come down on it?

A. Yes, sir, the excess weight coal might come down on it.

Q. 71. At the end of your day's work, you get back to your section on Gravel Creek around three-thirty or a little after?

A. I figure my day's work is done, and I turn in my report of how many cars I pulled.

Q. 72. Who do you give that report to?

A. The section foreman. I wouldn't know what to report until I finished my day's work.

Q. 73. How long do you spend at the man-station until you start out?

A. Not so very long; maybe five minutes, some times ten.

Q. 74. What are you doing during that time?

A. I maybe will be giving my boss the report or talking to the coal loaders about the day's work.

Q. 75. How do you get out of the mine?

A. We get out practically along the same line of going in.

Q. 76. Who gives you permission to come out?

A. Some times I what is known as tail the man-trip out.

Q. 77. That is, to get on the rear of the trip as a kind of protection?

A. Yes, sir, in case the trip broke loose on the grade, the motor would be there to keep the cars from running away or keeping any one from getting hurt.

[fol. 541] Q. 78. If you are not tailing the man trip, what do you do?

A. I turn my report over to the boss and he will tell me to go on out.

Q. 79. Do you phone in to the dispatcher?

A. We have to go eight or nine hundred feet from our section to the telephone, and we have to run that and look out for a tram.

Q. 80. You have no way of signalling?

A. No, sir, just merely watch for the tram.

Q. 81. Do you have any way of letting other trams know you are coming?

A. No, sir.

Q. 82. Do you have any horns on those trams?

A. No, sir. They have one motor that has an electric-air horn.

Q. 83. That's not the one you are on?

A. No, sir.

Q. 84. Do you have an electric light on it?

A. Yes, sir, you have a head light on each end of the motor.

Q. 85. Do you drive that distance of nine hundred feet rather slowly so you can back up if necessary?

A. No, I don't know that you would say so slow. You go about as fast as the motor will run.

Q. 86. And keep a lookout for what is coming?

A. Yes, sir.

Q. 87. When you reach the nearest phone, what do you do?

A. Ask the dispatcher about the road to the outside.

[fol. 542] Q. 88. And he gives you instructions?

A. Yes, sir.

Q. 89. Will he usually give you instructions as to a clear track all the way out or part way?

A. You never ask him about the right of way out. You will ask him how about the road down First North.

Q. 90. You mean that's the first telephone?

A. No, that's the first I come to, and if there is nothing coming down, he will tell you to come on up.

Q. 91. Why doesn't he give you a clear signal to come on out?

A. I don't imagine he could hardly do so.

Q. 92. In getting your motor out after the day's work is over, is the right of way given to the trams hauling coal?

A. It generally is, if the tram happens to be in transit between you and the tipple, usually the preference is given to the tram.

Q. 93. He says come on up and you come to the dispatcher's office. What do you do there?

A. You usually tell him how many cars of coal you have gotten that day, and how many cars you have left in the load-hole and how many empties you have left.

Q. 94. You make a report to him?

A. Yes, sir.

Q. 95. Does he give you clearance as soon as he can the rest of the way?

A. He usually gives you right of way as far as he can, some times all the way through to the shop and some times [fol. 543] it isn't. He will tell you where to call him and you go to that phone and call him back.

Q. 96. You come out all the way if you can and if you can't you go as far as you can by calling him back for further directions?

A. Yes, sir.

Q. 97. When you get on the outside, what do you do with your motor?

A. You switch off the main line to the sand house or shop track.

Q. 98. Do you leave your motor there all night?

A. No, it is usually used two shifts.

Q. 99. So far as you are concerned, that's where you leave it?

A. Yes, sir.

Q. 100. Do you make any report to any one else on the outside?

A. From April 1st to June 20th, you went in the mine office and reported on a book, sheet of paper, the condition your motor was in.

Q. 101. You go in the mine at what time in the morning?

A. Approximately seven o'clock or a little after.

Q. 102. And you come out about what time?

A. We figure we may be four-fifteen or four-thirty, maybe a little after.

Q. 103. I believe you said you are generally at the man-station for your section about eight o'clock?

A. Approximately eight o'clock.

[fol. 544] Q. 104. And you get back there about three-thirty or a little after?

A. Yes, sir, as a rule.

Q. 105. The rest of the time is spent in the working places?

A. Or gathering coal.

Q. 106. And between three-thirty and four-thirty, you are coming out?

A. Yes, sir.

Q. 107. What time does your pay start?

A. Well, eight o'clock.

Q. 108. What time does it end?

A. Three-thirty, if I am not tailing the man-trip.

Q. 109. And you take thirty minutes for lunch?

A. Yes, sir.

Witness stands aside.

At this point, it being 5:00 o'clock P. M., Court was adjourned until tomorrow, Tuesday, the 23rd day of November, 1943, at 9:30 o'clock A. M., at which time the trial of this case was resumed.

STIPULATION

It is stipulated and agreed that throughout the period from April 1, 1943, to June 20, 1943, the mines of the Jewell Ridge Coal Corporation were operated on a six-day week basis, and that the witnesses who have testified for the defendants worked during that period in some weeks more than forty hours a week on a face to face basis.

By Mr. Rogers: If your Honor please, we have interrupted the testimony to get in one stipulation and now we [fol. 545] should like to get in another, with your permission.

STIPULATION

It is stipulated between counsel that certainly back as far as 1912, Section 2 of Article II of the Constitution of the United Mine Workers of America, under the heading "Objects", contained this clause:

> "To demand that no more than eight hours from bank to bank in each twenty-four hours shall be worked by members of our organization".

It is further stipulated that that same identical language has appeared in every subsequent Constitution from year to year, except that in 1920, the word "eight" was changed to "six".

By the Court: Is that correct, gentlemen?

By Mr. Richardson: We agree that these facts are as Mr. Rogers states, but the stipulation is merely to the facts and not as to the relevancy or admissibility in evidence.

By the Court: Very well, let it be so stipulated upon that understanding.

JIMPER BARTLEY, the witness heretofore introduced on behalf of the defendants, being recalled, testified as follows:

Cross-examination.

By Mr. Stuart:

Q. 1. You say your section is the Gravel Creek Section?

A. Yes, sir.

Q. 2. And your job there is to go around with your motor [fol. 546] and deliver the empties to the various rooms and pick up the loads and bring them back to where the main line motors can get them?

A. Yes, sir.

Q. 3. Now, in order to get to your section in the morning, you say you ride your motor there?

A. Yes, sir.

Q. 4. You don't haul anything in with your motor,—you bring yourself and your brakeman in with your motor, do you?

A. Well, generally speaking, you do. Some times we have —maybe a coal loader will miss a man-trip or something, and we take a car and take him in.

Q. 5. What I am talking about is on your job of hauling mine cars, you don't begin hauling any mine cars until you get on your section?

A. Well, I say once in a while, I will do that, maybe once a month or once every two months, we will take a car and take something in it. That's where we start our work, on our section, but we claim our work pretty well starts from the time we reach the mine.

Q. 6. That's what you are claiming now on account of your items of oiling and sanding your motor, that's the reason you are claiming that?

A. We have always did that.

Q. 7. You are not claiming that your work starts before you get on the section on account of any hauling you do before you get on the section, are you?

A. We don't haul anything except like I say there.

[fol. 547] Q. 8. When you do haul any mine cars before you get on the section, your work is paid for from the time you start the hauling, isn't it? If you haul extra, you get paid extra?

A. Not generally always.

Q. 9. Do you generally some times?

A. Once in a while, we do.

Q. 10. Now, your brakeman rides in with you in the morning?

A. Yes, sir.

Q. 11. He rides out with you when you get through at the end of the shift, does he?

A. Yes, sir.

Q. 12. When you go in in the morning, do you some times tail a man-trip with your motor?

A. Yes, sir.

Q. 13. When you do that, when does your pay start?

A. Well, we get eight hours a day regardless of how long we are on.

Q. 14. And if you start in in the morning, tailing a man-trip from the portal, the entrance of the mine, your pay doesn't start any sooner than if you didn't do that?

A. If we start inside at seven o'clock and return back at four o'clock, we get eight hours a day instead of seven.

Q. 15. The same thing happens if you tail a man-trip or any other trip coming out at the end of the shift?

A. We get paid for what time it takes us. If it is thirty minutes, we get paid for thirty minutes; forty minutes, we get paid for forty minutes; an hour, we get paid for an hour.

Q. 16. And if there are two of you, and one of you tails [fol. 548] the man-trip going in in the morning, and the other tails it coming out, you get paid for the time you spend on that?

A. He gets paid for what time it takes him to take it in and I get paid for what time it takes me to bring it out.

Q. 17. And if you tail it in and he tails it out, it's the same thing?

A. The same process.

Q. 18. Now, you speak of information that you give your section foreman and also information that you give the dispatcher at the end of your day's work on the section. When you give information to the section foreman at the man-station before you come out, that information is about the number of cars that have been loaded in the various rooms on your section during the day, is it?

A. Yes, sir.

Q. 19. And the section foreman takes down that information that you give him, does he?

A. Yes, sir.

Q. 20. Then, when you talk to the dispatcher before you come out, you tell him how many empties are left on the section and how many loads are left there?

A. Yes, sir, on the sidetracks.

Q. 21. And that's the information you give before coming out?

A. Yes, sir.

Q. 22. Does the dispatcher take that down or does he phone it right in?

A. He makes a note of it. He has forms there that he puts it down.

[fol. 549] Q. 23. Now, Mr. Bartley, you said there were some occasions, perhaps once a month, when you might haul some man in with your motor who had missed a man-trip, and you said you some times generally didn't get paid for that. If you haul a man-car in, you can get paid for it if you apply for it, can't you?

A. Well, I wouldn't say that I couldn't and I wouldn't say that I could.

Q. 24. When you take a man in like that who has missed a man-trip, you figure you are doing it to accommodate him and don't make any claim for it; is that it?

A. I imagine I must do something like that, for I never did ask them to pay me for it.

Q. 25. Your use of your motor in going into your section of the mine in the morning is a convenience to you, you would rather ride the motor in than to ride the man-trip in, wouldn't you?

A. I imagine so.

Q. 26. The same way coming out at the end of the shift, you would rather ride the motor out than ride a man-trip?

A. Riding a motor is some more comfortable than riding a bank car.

Redirect examination.

By Senator Muse:

Q. 1. The motor you ride in, is that the same motor you use during the day to gather the cars and place them around?

A. Yes, sir.

Q. 2. When you tail a man-trip in and tail it out, also, between April 1 and June 20th, how much time were you [fol. 550] allowed a day?

A. We were allowed one hour a day, approximately, what I mean, whatever amount we—we just got eight hours a day, seven hours at our usual working place and one hour for tailing the man-trip.

Q. 3. Am I correct in saying that during that period from April 1 to June 20, you were given one hour a day for doing that?

A. Yes, sir.

By Mr. Stuart: I understand him to say he didn't tail it in and out on the same day.

Q. 4. Did you ever tail a man-trip in and out on the same day?

A. Yes, sir.

Q. 5. Between April 1 and June 20?

A. I believe it was between that time.

Q. 6. If you did, how much time were you allowed for that tailing business?

A. I was allowed one hour a day.

Q. 7. Suppose it took an hour and a half?

A. I was allowed one hour.

Q. 8. Or two hours?

A. I got one hour a day.

Q. 9. Regardless of what time it took?

A. Yes, sir.

Q. 10. How long did it take you, on an average?

A. It took an hour and a half to two hours.

Q. 11. It usually took more than an hour and up to two hours?

[fol. 551] A. Yes, sir.

Q. 12. For which I understand you were allowed one hour's extra pay?

A. Yes, sir.

Q. 13. I may have brought this out on direct examination. If so, I don't recall it. Mr. Bartley, generally speaking, what time did you go in the mine in the morning?

A. Approximately around seven o'clock.

Q. 14. And come out at what time, approximately?

A. Around four-fifteen; maybe four-thirty; maybe later.

Recross-examination.

By Mr. Stuart:

Q. 1. Mr. Bartley, you were talking about—in answer to Senator Muse's question just now, about what happened between April 1 and June 20, during which period, as I understood, you said there were occasions when you tailed the man-trip both in and out. Did anything happen on June 20th which stopped that?

A. Well, I wouldn't—I don't believe I would want to state it was on June 20th.

Q. 2. What did June 20th have to do with that?

A. I don't know whether it had anything to do with tailing it both ways.

Q. 3. Was it stopped?

A. Some time between April and I will say—between April and November,—that's seven months——

Q. 4. You mean between April and this present month?

A. Yes, sir, we—I believe I asked Mr. Hagy why it was I wasn't getting all the time it taken me to tail the man-

trip and he said he thought we was getting paid, and I [fol. 552] told him we had not been and he told the foreman I worked for to count the time and check the time, and see that I was getting paid for all the time I taken, and some time during that space of time, me and Mr. Horton was taking time about tailing the man-trip in and then after that they put it that he would tail it in and me tail it out.

Q. 5. And you have been getting, since that date, whatever it was, you have been getting all the time you actually took?

A. Yes, since I taken the question up with Mr. Hagy.

Q. 6. And they figured back to see that you got paid for the actual time you put in, did they?

A. Not all the way back.

Q. 7. How far back?

A. I got four hours, the foreman turned me in four extra hours dated from the time I taken it up with Mr. Hagy.

Q. 8. Do you think that change was made some where around June 20th?

A. That he tailed it in and me tailed it out?

Q. 9. Yes, when they began paying you for the actual amount of time you took instead of paying you for an hour?

A. I couldn't exactly say. I have my time down but I have it at home. I don't have any record of it here with me and I wouldn't want to say it was later than June 20th or wasn't after June 20th, by to my opinion, it was after June 20th. I wouldn't want to be positive on the question.

Q. 10. Before that time when you brought that question up, had you made any objection before about getting a [fol. 553] flat hour's time when you tailed a man-trip, when you brought up the question about not getting as much time as you actually took?

A. I believe it was some where in April a number of us motormen taken up this question of time with the mine management and had a grievance case to that effect, asking for that time, what time the contract allowed us for pulling man-trips. I won't say positive it was in April, though I believe maybe the 19th or 26th, along in there some where, and approximately along at that time, they taken it away from the gathering motors and put it on the tram motors to work the man-trip.

Q. 11. As a result of that grievance and the action on it, the previous plan of allowing you a flat hour, which had

been the regular way before that, was changed to allow you the exact time, whatever it was?

A. No, I don't think it happened that early. It was later than that.

Q. 12. It happened after the grievance was made?

A. Yes, some time after that.

Q. 13. It was put up to the management in your grievance and at some subsequent time, the management and the grievance committee agreed on the time it actually took?

A. That was after I went to Mr. Hagy myself, me and one of the mine committeemen.

Q. 14. That was in your individual case?

A. Yes, sir.

Re-direct examination.

By Senator Muse:

Q. 1. Am I correct in understanding that you get extra [fol. 554] pay only when you tail in a man-trip or tail it out?

A. Yes, that's the only time.

Q. 2. If you simply drive your motor in to the place you work, am I correct that you are not paid for that time?

A. No, sir.

Witness stands aside.

Omer Ketron, another witness, introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Senator Muse:

Q. 1. You are Mr. Omer Ketron?

A. I am.

Q. 2. How old are you?

A. Thirty-one years old.

Q. 3. I believe you are employed by the Jewell Ridge Coal Corporation?

A. I am.

Q. 4. You have been employed how long?

A. Well, I took my first job with the Jewell Ridge Coal Corporation in 1931, and since that time, I have been away from there about two years, I guess.

Q. 5. Have you been following the mining business since 1931?

A. I have been following the mining business since I was sixteen years old, immediately after my sixteenth birthday, that would have been about 1928.

Q. 6. Where do you live, Mr. Ketron?

[fol. 555] A. I live at Seaboard, a small mining camp about five miles from the Jewell Ridge Camp.

Q. 7. And I believe you are what is known as a brakeman?

A. That's right.

Q. 8. You are also one of the defendants in this case?

A. I am.

Q. 9. What is your connection with the Local Union?

A. I am recording secretary and a member of the mine committee.

Q. 10. Mr. Ketron, what time do you go to work in the morning?

A. Well, it's not always exactly the same time. It's usually around six-thirty.

Q. 11. A. M.?

A. That's right, of a morning.

Q. 12. What's the first thing you do when you arrive in the morning, Mr. Ketron?

A. I come to work on a bus and I get off and get in line to get my light.

Q. 13. You get your lamp just about like the other men have detailed?

A. That's right. Just about the same procedure.

Q. 14. Who is the motorman for whom you brake?

A. Elmer Hooker.

Q. 15. In what section do you work?

A. First North Straight.

Q. 16. After you get your lamp, what do you do? What's the first thing after that in the order of your day's work?

[fol. 556] A. Well, I put my lamp on my head and go out to the motor-barn. I guess any one not acquainted with mines would call it a yard.

Q. 17. That's where the motors are?

A. That's where the motors are all set back.

Q. 18. Is there anything overhead or just the sky?

A. That's right. They can't get them all under the shelter however.

Q. 19. Some are in the shelter and some are not?

A. Yes, sir, 00 and I hunt up the motor I work on,—in my instance, it's No. 8, and I set my bucket on the motor.

Q. 20. You mean your lunch bucket?

A. Yes, sir.

Q. 21. Do you carry your water in the bucket, too?

A. That's right.

Q. 22. Is that generally customary with the men?

A. Yes, sir.

Q. 23. After you put the bucket on the motor, what do you do?

A. As quickly as possible, we get shifted out from whatever might have us blocked.

Q. 24. You mean you and the motorman?

A. That's right. I help him in case there is any switching to do. I do all I can to help him start.

Q. 25. Is there much switching to be done ordinarily?

A. If they have set any of the large tram motors in this track, as they usually do, they must be switched out in the clear so the gathering motor can move up to the sand house. [fol. 557] Q. 26. Do you usually find more than one of the large tram motors in front of No. 8?

A. Some of them are always sitting in there. I don't recall a single instance that one hasn't been there.

Q. 27. So you have to do some shifting every morning?

A. Yes, sir, that's right.

Q. 28. Do you vary in amount, depending on how many motors are in front of you?

A. Yes, sir.

Q. 29. After you have gotten your motor cleared, what do you do?

A. We go up to the sand house and sand the motor up. We have two large steel hickeys about that long, made in the shape of an ice-cream cone, and we get one of those each and fill the boxes up on the motor.

Q. 30. Do they contain sand*ed*?

A. That's right. We dip the sane up out of a large box. It's about as large a box as the bar is long there.

Q. 31. Who oils the motor?

A. My buddy does that. Some times I help.

Q. 32. You are the buddy of the motorman?

A. I am the buddy of the motorman. If there is anything I can't do by myself, I help him.

Q. 33. You usually help do the sanding?

A. Yes, I always help do the sanding.

Q. 34. And some times help do the oiling?

A. Yes, sir.

Q. 35. Who gets the oil can?

A. My buddy does.

[fol. 558] Q. 36. After the oiling and sanding has been done, what do you do with the motor?

A. Well, we stay there until we are given the signal to go in.

Q. 37. Do you ever carry any tools in with you?

A. No, we don't have any tools other than just the regular equipment on the motor.

Q. 38. Which stays on the motor?

A. That's right.

Q. 39. The job of the gathering motor is to gather up loaded cars and take empty cars back to the miners?

A. That's right.

Q. 40. Who is it gives the signal to go in?

A. As a usual thing, the dispatcher does that.

Q. 41. Is he on the outside at that time?

A. That's right.

Q. 42. When he gives you the signal to go in, are you able usually to go directly to your section, First North Straight, or do you have any switching to do or sidetracking to do usually?

A. Well, it depends upon whether we get started in ahead of the man-trips or behind them. Some times some of the motors are switched over on the main line ahead of the trams and some of them are in the sidetrack by the tram house.

Q. 43. Suppose you get started on in?

A. If we get started on, without interference, except we have to stop for derails and so forth.

Q. 44. If you get in behind the tram, do you encounter any delay?

[fol. 559] A. Yes, these long trips that was between, I believe, about June 26th or 27th, some where along there, and up until October or possibly November 1st; when they installed the new system of man-trips,——

Q. 45. But under the old system——?

A. That's right, if we got behind the man-trips it was slow. They had to stop along and pick up men and we would pull out as they give us room to pull out.

Q. 46. You had to adjust yourselves to the main man-trip putting off cars to be taken down to the various sections?

A. That's right.

Q. 47. What duties did you have while going in in the morning? You were brakeman and not operating the motor, were you? Did you have any switches to throw, for instance?

A. At the dispatcher's office there is what I would term a safety switch, it's a switch at the top of the First North grade that they keep thrown for the empty chute or empty sidetrack. It's a regular sidetrack there and it's to keep anything that might run away and get loose up there from going down that steep grade down into First North. It's very near a mile down there and all down grade, anything that gets loose and runs away keeps going faster and faster.

Q. 48. And you throw the switch so as to divert it and keep it from going down into that section?

A. That's right.

Q. 49. Do you throw any other switches?

A. I have two derails,—that's rails with a single latch on one side that opens up in order to wreck anything that [fol. 560] might be running away.

Q. 50. In order to pull these switches and derails, do you do that while the motor is running or is the motor stopped while you do that?

A. Well, he comes very near to a stop. It's usually just moving along slow. I jump off,—riding back on the end with my motorman, I jump off and run up and go by the motor and throw the switch and when he gets by, I throw it back.

Q. 51. You jump off, run ahead of the motor, and when he passes by, you throw it back in the original position?

A. That's true.

Q. 52. And you do that three times?

A. Yes.

Q. 53. If you fail to throw that switch, are you subject to being disciplined?

A. If any runaway happened and anybody got hurt,—if nobody got hurt, I guess I would get by with it, but if anybody got hurt, I would be long gone from my job.

By the Court:

Q. 54. Do you mean the switch that leads into your section?

A. It's a safety switch. We did have a man killed there because that wasn't done right.

Q. 55. Suppose you left it open,—is that the switch that leads down into the section?

A. Yes, sir, it's used as a safety switch.

Q. 56. It's used as a switch to let you in there?

A. Yes, sir, but it has to be left one certain way.

Q. 57. If you left it open, anybody who came behind you [fol. 561] would of necessity go in there, wouldn't they?

A. That's right. Anything that was following him would follow him right on in there.

By Senator Muse:

Q. 58. Is it true the road you take goes down grade?

A. Yes, it's really steep all the way down in there.

Q. 59. After you pass over it, are you required to throw that switch so that if any equipment following you down there, that it goes off on a track that does not have that steep grade?

A. Yes, it goes off on a track that's level instead of going down the way I have gone.

Q. 60. Where are the derails placed?

A. They are situated on down the hill at regular intervals. I don't know, I would estimate them to be—well, fifteen hundred feet apart.

Q. 61. Is that on the main track into your section?

A. That's true, yes.

Q. 62. And these derails are on that steep track, going down grade?

A. Yes, sir.

By the Court:

Q. 63. How do you spell it?

A. D-e-r-a-i-l.

Q. 64. What's the purpose and function of those things?

A. It's a safety appliance in the mines to—some times we have runaways in there on those steep grades and that is a break in the rail and it's worked on the hinge system, latch like,—just like on the railroad.

[fol. 562] Q. 65. Is it the purpose of the thing to make you stop and throw it?

A. No, the purpose is if anything is running away, to wreck that to keep it from killing somebody.

Q. 66. And to get all the way to your section, you have to throw those switches?

A. Yes, and have to close them up behind him, so if anything should be following, it would be safe.

By Senator Muse:

Q. 67. To the section where you work, it's approximately what distance, as best you could estimate?

A. It would just be a guess. I would say four miles.

Q. 68. The map measured would show the accurate distance?

A. Sure, I wouldn't argue with that.

Q. 69. In riding the motor in, are you able to sit up in the motor like you are sitting in that chair?

A. No, I have to keep my head down.

Q. 70. Is that true in the main haulage way?

A. In the main haulage way, with the exception of possibly one place, until I get down to where I get my empties, I have to keep my head down like that. There is only one place that I remember, and how come me to remember that, I rammed my head in to it one morning and it gave me quite a jar.

Q. 71. In the main haulage?

A. Yes, sir.

Q. 72. How are you able to ride after you leave the main haulage?

A. I am always riding an empty car. I wouldn't say. Always, when I go back to pull off my loads in the evening, I ride a car but the rest of the time I have an empty car ahead of the motor, maybe several of them, maybe up to nineteen or twenty and I am riding in the head-end car.

[fol. 563] Q. 73. Are you able to sit up like you are there now?

A. No, they have about that much clearance down that way.

Q. 74. Assuming that the chair is the car you are sitting on, demonstrate how you have to ride?

A. I have my feet about like this and looking this way and shining my light out over the end of the car.

Q. 75. Your pay time starts what time in the morning?

A. At eight o'clock.

Q. 76. At what point are you usually when eight o'clock arrives?

A. At the parting where I receive my empties, we call it the empty hole.

Q. 77. Is that in your section?

A. That is, it is near my section, near enough that I can get empties from that point.

Q. 78. Do you have to go to the man-trip station on your section as some of the other men have to go?

A. Not directly from the outside.

Q. 79. Well, at eight o'clock, are you usually hooking on to the empties you are going to take to the men who are working or what are you usually doing at eight o'clock?

A. I am hooking on to the empties at eight o'clock, usually hooked on at that time.

Q. 80. Now, you take off some time during the day for a luneh period, I reckon?

A. When it is most convenient.

Q. 81. You suit your convenience about that?

[fol. 564] A. Yes. I try to get the men all the cars they can load and want and I don't take it at any stated time during the day. Whenever I happen to be present where I keep my bucket.

Q. 82. Whenever you happen to get hungry?

A. I don't always get to that place when I get hungry. Sometimes I have to wait a while.

Q. 83. When three-thirty arrives, what are you doing, usually, at that time?

A. That's my quitting time. As a usual thing, I try to have my last trip of loads ready to set in the side track. Some times, I am a little late.

Q. 84. You mean you try to have your last trip of cars loaded with coal ready to set in the sidetrack?

A. That's right. I usually try to have them in there and ready to cut off at quitting time, but that varies. You have to clear the section up and the pillars.

Q. 85. You may or may not be through at three-thirty?

A. That's true.

Q. 86. What time does your pay quit?

A. At three-thirty.

Q. 87. Getting out of the mine, what process do you and your buddy use to get out of the mine back on the outside?

A. We ride the motor.

Q. 88. Do you come before the man-trip or after the man-trip usually?

A. Ahead of the man-trip nearly always.

Q. 89. From whom do you get orders permitting you to come out, the track clearance?

[fol. 565] A. The first telephone is, I would say, seven hundred feet from our load-hole where we set our loads off, and we come up there and call the dispatcher and if there is no trams coming down the grade to meet us, we get the road up as far as the dispatcher's office.

Q. 90. In traveling that seven hundred feet or approximately that distance, do you have any way of knowing whether there is anything approaching on that section?

A. We can see the entire seven hundred feet ahead of us.

Q. 91. These motors have lights on them, as I understand?

A. That's true.

Q. 92. And as you look up the tunnel or passageway for the seven hundred feet, if there is a motor coming with a light on it, you can see it?

A. That's right.

Q. 93. And you come to the nearest telephone and call the dispatcher and he gives you clearance as far as he can?

A. That's true.

Q. 94. Does he usually give you clearance all the way out immediately or tell you to come to the dispatcher's office?

A. No, it's not very usual that we get a clearance all the way outside.

Q. 95. What do you do, come to the dispatcher's office?

A. He will tell us to call him at Middle Creek, and if not there, there is another telephone at the foot of the hill and he will tell us to call him there, or pass something on the side track there.

[fol. 566] Q. 96. He gives you orders to advance as far as he can?

A. That's right.

Q. 97. Until he finally gives you clearance all the way out?

A. That's true.

Q. 98. When you get out with your motor, what do you do with it, you and your buddy?

A. We switch in as near as possible on the same bunch of tracks that we got it off of that morning,—not always the same track but always in that same bunch, off the main line.

Q. 99. Then what do you do?

A. Go to the lamp house and put my lamp there.

Q. 100. Who turns in the oil can?

A. My Buddy. He has a locker.

Q. 101. Generally speaking, you go into the mines at what time in the morning?

A. Some times a little before seven o'clock and some times as much as fifteen to twenty minutes after seven. It varies.

Q. 102. What time do you get out of the mine?

A. About four-thirty, I believe, would be about the average time. Of course, that varies, too.

Q. 103. And you are paid from eight to three-thirty, with thirty minutes off for lunch?

A. That's right, unless I should be required to stay as much as forty minutes or an hour over time, by getting right on the section foreman, I can get some over time pay out of that.

[fol. 567] Q. 104. During the thirty to forty-five minutes when you get overtime, are you required to do anything?

A. Yes, he don't let us—there's not any call for us to stay at work unless we have to clean up the loads to clear the way for the cutting machine, or loads we couldn't get off before quitting time, on the pillars.

Q. 105. Is it true that there would be overtime actually pulling loaded cars out?

A. Yes.

Q. 106. Are you paid anything for going from the portal of the mine to your working place and from your working place back to the portal of the mine?

A. No, I am not paid anything for that.

Q. 107. During the period from April 1st, these mines were working six days a week?

A. Yes.

Q. 108. And since then?

A. Yes, sir.

Q. 109. Have you been working usually the full six days a week? Some weeks you probably wouldn't, but generally, do you work every day?

A. I consider that I have been off one day with sickness during that time and about three days for the Local Union, business for the Local Union.

Q. 110. Otherwise, you have worked every day?

A. That's right.

Q. 111. Mr. Ketron, how do you brake those trips? Suppose you have got some loaded cars you are handling, for [fol. 568] instance, what is the method of braking, keeping these cars from running away?

A. We don't have any brakes on them. They use a slide or sled, a thing they put on the rail in under the loaded cars,—of course, we don't use any of them on our section, we pull all our loads uphill and take the empties down, but when they bring loads down, they have a long sled that goes under both wheels.

Q. 112. Is that a long steel piece?

A. It is an angle bar that fits on the rail.

Q. 113. Very sharp on one end?

A. Yes, so the wheel will take and run up on the sled and it has a lug on the other end.

Q. 114. You put this steel piece between the wheel and the track and it slides on it like a sled?

A. That's right.

Q. 115. On the main haulage particularly do these trams get out of control, these trams hauling cars, do they get out of control from time to time?

A. Yes. We have a run away of loads. We had a run away a few days ago that tore up a bunch of cars.

Q. 116. Was it a run away of loaded cars?

A. That's right.

Q. 117. That took place in what portion of the mine?

A. It run away from the top of the hill at Jones Fork on that strip of track to the curve at the foot of Bulldog, as we call it. It's an extra steep part of a steep grade.

Q. 118. Did any one get hurt?

[fol. 569] A. No, there wasn't any one hurt, I don't believe, in that run away.

Q. 119. In going in and coming out, do you run into the danger of a portion of the roof falling on you?

A. Yes, there is loose rock at places all the way in. Some of it has had drill holes put in it, and it hasn't been taken down yet. I don't know whether they had it drilled and then changed their minds about it being dangerous or not.

Q. 120. At various places over the portion of the mine that you work in, state whether or not there are places in which they have chalked on the roof "Bad Roof" or some expression that means the same thing?

A. Yes, there is places along the main line that has a cross-mark on it with chalk and as a usual thing, the fore-

man that makes that chalk mark marks his initial after it.

Q. 121. What does that mean?

A. On anything in the mine, it means it is a dangerous condition.

Q. 122. After these cross marks are placed on the roof or wherever they are placed, is that rock removed immediately or does that cross-mark stay there some times for days and weeks?

A. No. I have known them to stay for months after they had been cross-marked and not be taken down.

Q. 123. Is that anything unusual or is that a more or less frequent occurrence up in the Jewell Ridge Mine?

A. In all sections that I have been on, I would say that in almost every entry there is chalk marked top, where they made the crosses on it, the bad top sign.

[fol. 570] Q. 124. After they have been chalked, does the rock some times fall down of itself before it is ever removed?

A. Yes, I have known it to do that.

Q. 125. More than once or occasionally?

A. Yes, I have known it to happen more than once in my mining experience.

Q. 126. Do you know of anybody who has been hurt on those man-trips, for instance?

A. Well, I seldom ride a man-trip. I haven't been on any of the man-trips where there was anybody hurt but I had heard before these other gentlemen testified and Mr. Hagy about most of the accidents they named. I don't know anything different from what they know. I know of those accidents.

Q. 127. Do you know anything about one of the load-trips getting away some eight months ago and killing a man? Do you know anything about it? I don't know whether you do or not.

A. It seems to me like it was much longer than eight months ago that I knowed of a man getting killed on a runaway trip, William Murphy. I would say that it was a little over a year ago that William Murphy was killed.

Q. 128. How was he killed?

A. It was the grade I was talking about these two derails and this safety switch being on. He was a drill man and the way I heard, he was traveling—he had come from the Parallel Section and was going to the First North Section to drill in First North and he passed this safety switch

and failed to throw it back and the tram had just pulled up out of First North with a trip of loads and pulled over far [fol. 571] enough for him to go down ahead of it and he was supposed to throw this safety switch back there and the brakeman on the tram trip was at the derail there that had a bad latch on it, and this brakeman informed me that he was watching this latch at this switch sixty to eighty feet from this safety switch, that goes back into this empty chute, side track, and William Murphy left this safety switch thrown the way he had went and when the motorman started back in there, he didn't know that his trip was ahead of him, he had pulled it up out of there, and he didn't know the trip was following Murphy until it was too late to check it, he tried to check it, the mortorman did, I believe his name was Alex Rimmer, and it followed Murphy and overtook him on this mountain, they only had one derail, they put the second one in after the accident, and it caught Murphy down on the hill and he was using the motor I work on in the day——

By Mr. Stuart: I don't like to interrupt, Your Honor, but this sounds wholly irrelevant, in as much as it is hearsay.

By the Court: It is certainly subject to the objection of hearsay. Now that you make it, I sustain it.

Q. 129. I notice you have lost some of your fingers on your right hand. How did you lose those,—in a mine accident?

A. Yes, I was braking at the time.

Q. 130. At Jewell Ridge?

A. I reached—yes, it was January 16, 1936, when I got those fingers mashed, and had to have them taken off.

Q. 131. And they were lost while you were braking over there?

A. That's right. I am getting the cap-board we use to scotch the cars with off the rail and the cars run over my hand.

[fol. 572] Q. 132. These sleds that you put under the rail and between the rails, are they put in while the car is standing still or moving?

A. Well, I don't know.

Q. 133. How do you put them in?

A. What few I have put under, they had to have them standing still. I have heard the other fellows say they put

them under while they were running but I don't see how they could. I would get killed trying it.

By Mr. Stuart: If Your Honor please, we have a standing objection, I believe, as to evidence of hazards and accidents in the mines?

By the Court: That is true and it is so considered to the extent of all such testimony.

By Mr. Stuart: I believe we also have it understood that in cross-examining or offering rebuttal testimony, we are not waiving our objection on that ground.

By the Court: It may be so considered. I don't know that you have made the point before, but it may be so considered.

Cross-examination.

By Mr. Stuart:

Q. 1. Mr. Ketron, the marking of the rocks in the top that you have mentioned, who does that?

A. Well, any one who may find a dangerous piece of rock may mark it, and report it to the mine foreman.

Q. 2. Anybody who goes along, if he thinks there is a dangerous place, he may mark it with chalk?

A. That's true, and he should—is supposed to go to the [fol. 573] mine foreman and report it.

Q. 3. Then the mine foreman comes and inspects it and decides whether it is dangerous, in his judgment, or not, doesn't he?

A. Well, I would have to guess at that. I wouldn't know for sure.

Q. 4. Then there is a crew they call the "scale crew" that comes along periodically and makes a detailed inspection of all the top and takes down anything they consider dangerous, isn't there?

A. I don't know whether we have any crew like that at —once in a while, when the mine is down idle for a few days, they will take some men in and do—before the mine is fixing to start back up, and do some straightening up around to get ready. That's about all I know about that.

Q. 5. Do you know Carl Shelton?

A. Yes, I know him.

Q. 6. Isn't he in charge of the scale crew?

A. Well, he is on the night shift. I didn't know that that was his line of work. I thought he was supply boss. That's what I thought his job was, but I don't know. I am a day shift man.

Q. 7. You didn't know they had the scale crew who went through the mine at night and took down these rocks where the foreman considered it was dangerous?

A. If they have one, I didn't know they had a regular crew for that.

Q. 8. You never heard of the scale crew?

[fol. 574] A. Well, I guess that would be the same term as the "rock crew" possibly. Nearly all mines have a rock crew.

Q. 9. Does your motor some times tail a man-trip, either going in or coming out?

A. What period—pardon me, please, but what period do you take into consideration, all the time during the past year up to the present time?

Q. 10. Well, what we are talking about is the time before the Government took possession on November 1st, the first day of this month.

A. Well, the empty situation become awful bad, we had a slate dump broke down, I believe, was the reason for it, and they put the section that I work on to work an hour earlier in the morning for about three weeks prior to the Government's taking over the mines this last time.

Q. 11. I don't want to know about any exceptional situation, just in general.

A. Well, outside of that three weeks, I recall from April 1st up to that exceptional situation my motor—the motor my buddy was driving tailing the man trip one time.

Q. 12. Well, you didn't do it much then; it was a rare thing with you?

A. No, no, I just——

Q. 13. Now, going back of April 1st, did your crew tail the man-trip on occasions before then?

A. Well, before I went to the First North Section, I worked for about a year, possibly a year, in second north, and we had one motor down there a while, and my buddy, [fol. 575] Hooker, and I pulled the man-trip,—that's been over a year ago, for a short time, until they put two motors back in there.

Q. 14. You have had some experience, though, in your motor tailing the man-trip, have you?

A. Yes.

Q. 15. Well, what I want to get at is what the usual practice has been where that's the case. Now, when that happens, your buddy, the motorman, gets paid, does he not, in the way that Mr. Bartley described?

A. Yes, Mr. Bartley's statement on that was accurate I think.

Q. 16. Now, as to the brakeman, as to you, do you get any pay for tailing the man-trip?

A. Well, no, the brakeman is not supposed to get any pay. Rather, according to the management,—we took that up with the mine foreman once and asked him about it, and he said he wasn't paying no two brakemen on no one trip. That's using his words without the profanity.

Q. 17. But the brakeman, when his motor is tailing the man-trip, doesn't have anything to do, does he? He is just riding in the same as before and his buddy, the motorman, is the man who really does the braking for that man-trip,—it's the motorman who throws the switches, isn't it, for the man-trip?

A. Yes, he leaves his motor, and it still running, and jumps off and throws the switch and runs and catches his motor.

Q. 18. But the brakeman of a tailing motor doesn't have to do anything like that, does he?

A. That's true.

[fol. 576] Q. 19. It's always been the practice for the motorman of the tailing motor to get paid and the brakeman not to get paid?

A. No, not always. There was a time when the brakeman did get paid.

Q. 20. How long ago was that?

A. It's been about three years since they paid a brakeman on the motor that was on both ends of the trip.

Q. 21. Did they pay the brakeman and the motorman both on the tailing motor?

A. They did at that time.

Q. 22. Do you know what the brakeman did at that time to get paid for?

A. He rode the trip and there isn't very much to do in the way of hard work on a man-trip for the brakeman, but

anything that come up that required his services; a wreck in the trip or switch to be thrown or laying back behind the trip, he did that work.

Q. 23. So at that time, he was doing some work in connection with the man-trip and did get paid?

A. That's right, and the management apparently decided the work was not hard enough for him to get pay for and took him off that and let the motorman do both jobs.

Q. 24. Now, Mr. Ketron, speaking of your quitting time, I understood you to say that your day ends at three-thirty there on your section?

A. That's my specified quitting time. I am supposed to be done and wound up at that time for my seven hours.

Q. 25. And I believe you said if you got through a few [fol. 577] minutes early or a few minutes late, that three-thirty was still considered your quitting time?

A. I was never—on the section I am on now, I don't remember ever being fortunate enough to get done early. The men would load as long as they had time to load a car at all and it would throw me right at quitting time or a little after always, some times as much as an hour late.

Q. 26. Well, when you run into any appreciable amount of time past your quitting time, you get paid for it, don't you?

A. Yes, if I take it up with the foreman and demand it.

Redirect examination.

By Senator Muse:

Q. 1. It is not quite clear to me, your statement that on the man-trips the motorman does certain brakeman's work or work ordinarily done by the brakeman. Will you explain that to me?

A. Well, going in, on these safety switches and derails, the man-trip has to pass over that same road, and in going down this grade, these switches necessarily have to be thrown back behind the man-trip, and the motorman has to jump off and throw the switches and then catch his motor on the fly.

Q. 2. What do you mean by "on the fly"?

A. The man in front might be pulling him pretty keen.

Q. 3. Is that done by the motorman on the front or the tailing motor?

A. On the tailing motor.

Q. 4. After the man-trip passes over and keeps moving?
A. That's right.
Q. 5. Do I understand the motorman on the tailing motor [fol. 578] jumps off the moving man trip and throws his switches or whatever he has to do and runs and catches the motor and gets back on?
A. That's true.
Q. 6. And that work you have described is done by the motorman on the tailing motor?
A. That's true.
Q. 7. And this man-trip is moving during all that time while the motorman is doing that?
A. Yes, the man-trip is moving during all that time.

Witness stands aside.

STEWART OSBORNE, another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Senator Muse:

Q. 1. I believe you are Mr. Stewart Osborn?
A. Yes, sir.
Q. 2. Talk loud enough for all of us to hear you without having to strain ourselves too much. You are employed by the Jewell Ridge Coal Corporation?
A. Yes, sir.
Q. 3. In what capacity?
A. I am a brattice man.
Q. 4. You are a brattice man?
A. Yes, sir.
Q. 5. What does a brattice man do? Give us some idea [fol. 579] of the type of your work.
A. The brattice man builds the stoppings on these breakthroughs where the coal has been taken out, to let the air go on up into the last breakthrough.
Q. 6. In order to regulate the flow of the air?
A. Yes, sir.
Q. 7. These brattices, what kind of material are they built out of?
A. Built out of wood and cinder block.

Q. 8. You build them either out of wood or cinder block?

A. Yes, sir.

Q. 9. What time of morning do you get to the lamp house?

A. Usually around six-thirty or six forty-five.

Q. 10. You get your lamp in the same way these other men have described; is that correct?

A. I do.

Q. 11. In your line of work, name the tools that you use in performing your duties? Have you made a memorandum of them?

A. I have. I use a hand-saw, brace and bit, hatchet, trowel, square, two wrenches, two different size wrenches, and pliers.

Q. 12. How about nails?

A. Yes, but they wouldn't be considered a tool.

Q. 13. You do use nails, though?

A. Yes, sir.

Q. 14. All right, Mr. Osborn, after you get your lamp in the morning, what's the next thing you do usually?

A. It depends. If I have materials to take in with me, [fol. 580] I go get those and carry them over to the portal.

Q. 15. What kind of material do you take in from the outside?

A. I take in cement.

Q. 16. That comes in bags?

A. Yes, sir.

Q. 17. How much do those bags weigh, approximately?

A. I wouldn't be sure, but I think they are ninety-five pounds.

Q. 18. What other material do you take in?

A. I also take in plaster.

Q. 19. That comes in bags?

A. It does.

Q. 20. How much do those bags weigh, approximately?

A. I am not sure. They may weigh a hundred pounds. I am not sure.

Q. 21. What other material do you take in?

A. I take in hinges for my trapdoors.

Q. 22. You get those where?

A. At the blacksmith shop.

Q. 23. How about the cement and plaster, where do you get that?

A. Usually from the motor-barn.

Q. 24. Do you have to have an order to get it?
A. No, the plaster and cement, I do not.
Q. 25. How about the hinges?
A. No order.
Q. 26. You said something about nails a few moments ago. [fol. 581] Do you take in nails every day?
A. Practically every morning, yes, sir.
Q. 27. Where do you get those?
A. At the mine foreman's office.
Q. 28. Do you have to have an order to get those?
A. I report to the mine foreman when the keg is running empty and he gives an order to the supply house and has them brought over, they are brought over at night.
Q. 29. So long as they are there, you get what you want?
A. By his permission.
Q. 30. How many nails do you take in daily?
A. Four or five pounds probably.
Q. 31. Is there any other material that you take in, that you remember?
A. Yes, I have to have bolts for those door hinges.
Q. 32. Where do you get the bolts?
A. I usually get them from the man in the lamp house.
Q. 33. Do you have to have an order to get them?
A. I do.
Q. 34. Where do you get the order?
A. The mine foreman some times gives me an order and some times Mr. Hagy gives me an order.
Q. 35. Is there anything else you take in?
A. I some times take in brattice cloth.
Q. 36. Is that heavy cloth that you use to close these openings?
A. Yes, sir.
Q. 37. Where do you get that?
[fol. 582] A. It is kept in the supply house.
Q. 38. Do you have to have an order for that?
A. I get an order for it in the evening, and it is usually set out in the evening or at night so I can get it the next morning.
Q. 39. Is there anything else you take in?
A. I have on an occasion or two taken in water and sand from the outside.
Q. 40. This brattice cloth, how much will that weigh, the amount you take in on one trip?

A. I take in a roll at a time. I wouldn't know just what it would weigh.

Q. 41. Give me your best estimate of it?

A. Between sixty and one hundred pounds some where.

Q. 42. How do you get the material into the mine that you are taking in? Suppose you had a bag of cement to go in tomorrow morning, how would you get it in the mine?

A. I would put it in the tool car on the man-trip.

Q. 43. How far do you have to carry it from where you get it to the man-trip tool car?

A. I suppose about one hundred and fifty feet.

Q. 44. Take that brattice cloth, do you have to carry that, too?

A. Yes, sir.

Q. 45. How far do you have to carry that?

A. It's usually left at night in the mine foreman's office, —a short distance,—fifty feet, probably.

Q. 46. How about the plaster and cement, how far do you [fol. 583] carry that?

A. I would say two hundred and fifty feet.

Q. 47. Suppose you had some of that material, some cement to go in in the morning, in what car would you carry that cement in?

A. I always put it in the tool car.

Q. 48. In the tool car for your section?

A. Yes, sir.

Q. 49. What section do you work in, Mr. Osborn?

A. Parallel Mains.

Q. 50. Is that the section you have been working in for some time?

A. Yes, sir.

Q. 51. How long have you been working in that section?

A. For a year or more.

Q. 52. And most of the work you do as brattice man is in Parallel Mains?

A. Yes, sir.

Q. 53. You ride the same man-trip that the other witnesses have referred to?

A. Yes, sir.

Q. 54. You get into the mine the same way they get there?

A. That's right.

Q. 55. At what point in your section do you get off and take your equipment off?

A. At the man-station.

Q. 56. Do you check in at the man-station?

A. No. I don't use a metal check but I leave my tools [fol. 584] at the man-station of an evening and take them out from there in the morning.

Q. 57. You pick up at the man-station the tools you have left there the evening before?

A. That's right.

Q. 58. Being most of the tools you have listed here?

A. Correct.

Q. 59. Do you work mostly over that section, Parallel Mains, in making these brattices?

A. I do.

Q. 60. How do you get your tools and equipment from the man-station to the particular section where you are working?

A. I carry my tools with me.

Q. 61. How far do you have to walk from the man-station to the place you work?

A. It would depend on what one of those entries I worked on. I work all the way from Eight Right plumb on in to Indian Creek.

Q. 62. In your judgment, the greatest distance would be what?

A. Fifteen or sixteen hundred feet.

Q. 63. How do you get the material over to the place you are working in?

A. The motorman brings the cement or lumber that I have.

Q. 64. How about the nails?

A. The nails I carry with me.

Q. 65. Hinges, too?

[fol. 585] A. No, sir, the motorman brings those.

Q. 66. You carry your tools and nails?

A. Yes, sir.

Q. You take off no more than thirty minutes for lunch some time during the day?

A. That's right.

Q. 68. When eight o'clock comes, whereabouts are you, usually?

A. Usually at the man-station.

Q. 69. And when three-thirty comes, that's your quitting time, I believe, were are you usually?

A. Well, I am usually on my way to the man-station to catch the man-trip at three-thirty.

Q. 70. You quit at approximately three-thirty?

A. Yes, sir, approximately.

Q. 71. And start back towards the man-station to catch the man-trip out?

A. That's right.

Q. 72. And you usually leave the man-station around eight o'clock in the morning?

A. Yes, sir.

Q. 73. I believe you say when you get to the man-station on your way out, you leave your tools there until the next morning?

A. That's right.

Q. 74. Suppose you have to have some tools sharpened or repaired, do you bring them outside, or what?

A. I some times do.

Q. 75. So far as sharpening your saw and so forth, I take [fol. 586] it you do that yourself?

A. Yes, sir.

Q. 76. Do you come back out of the mine on a man-trip?

A. Yes, sir.

Q. 77. The same way these other witnesses have described?

A. I do.

Q. 78. Under the same conditions?

A. Yes, sir.

Q. 79. You usually enter the mine at seven o'clock or shortly thereafter; is that correct?

A. Yes, sir, around seven o'clock.

Q. 80. And get back out at what time?

A. Oh, any where between four-thirty and five o'clock.

Q. 81. Just as these other men?

A. Yes, sir.

Q. 82. And your pay time is--seven hours a day, is it?

A. Yes, sir.

Q. 83. From eight to three-thirty with thirty minutes off for lunch?

A. Yes, sir.

Q. 84. When you leave your man-strip station in your particular section, which is Parallel Main, and walk to wherever you are working, whatever the distance may be,

are you able, in that section, to walk erect or do you have to stoop over?

A. On those main entries, you can walk standing up straight.

Q. 85. How about when you reach the cross-entries?

A. Those cross-entries are high enough that you can [fol. 587] walk standing straight, but in the breakthroughs where I work, you can't stand straight.

Q. 86. While you are walking to the breakthroughs and leave the cross-entries, what distance will that be usually, in your judgment?

A. Just a short distance.

Q. 87. Can you give us some idea?

A. The breakthroughs are cut from one entry to another, just a short distance.

Q. 88. Do you walk on the track or on the side of the track?

A. On the track, usually.

Q. 89. What is the condition of that track, is it smooth or rough with coal and rock?

A. It has rock and coal and stuff scattered in it.

Q. 90. Just about like these other witnesses have described?

A. Correct.

Q. 91. Is the walking condition you have, walking back and forth to the man-station very similar to the conditions the other men have described that they encounter as they walk back and forth?

A. Yes, sir.

Q. 92. You stated that you gave certain orders to the boss at the end of your shift, I believe, Mr. Osborn; is that correct?

A. If I need material, I do. I tell him about it at the end of the shift.

Q. 93. Which is that, the section boss or the mine foreman?

A. The section boss, and occasionally the mine foreman.

Q. 94. But it would generally be your section foreman? [fol. 588] A. Yes, sir.

Q. 95. You said something about lumber. Where do you get the lumber? Is that brought to you or do you go get it?

A. The lumber is brought on the section at night.

Q. 96. Is that lumber brought to the point you are going to work or do you have to carry it?

A. It is scattered some where along the section.

Q. 97. How do you get it?

A. The gathering motor brings it to me.

Q. 98. Do you come to the mine in the morning and leave in the afternoon by automobile or truck or how do you get there?

A. I walk.

Q. 99. Mr. Osborne, in the section you work in, are you bothered with bad odors, disagreeable odors?

A. Yes, sir.

Q. 100. Is it sufficient to be obnoxious?

A. It is.

Q. 101. Have you got any gnats in where you work?

A. Yes, sir.

Q. 102. The mines, it is conceded, were working six days a week from April 1st to June 20th, and since then for that matter. Have you, generally speaking, been working the entire six days a week?

A. Well, not at all times.

Q. 103. Have you in some weeks?

A. Yes, sir.

Q. 104. Do you generally work the six days?

A. Yes, sir, when I am there, and not going home, I do.

[fol. 589] Q. 105. Did you work six days in some of the weeks between April 1st and June 20th?

A. Yes, sir.

By Mr. Stuart: I believe we have a standing objection to the odors and gnats?

By the Court: You have.

Cross-examination.

By Mr. Stuart:

Q. 1. These odors and these gnats that you mention, Mr. Osborne, don't affect you while you are riding a man-trip, do they?

A. No, not so bad on the man-trip.

Q. 2. When you say they are not so bad, you mean they are not there at all, don't you?

A. No, you won't notice them on the man-trips.

Q. 3. About your supplies, you spoke of bags of cement weighing ninety-five pounds, bags of plaster weighing one

hundred pounds and brattice cloth weighing sixty to one hundred pounds a roll. Those supplies are ordinarily taken in for you without your having to do anything about it except tell the general mine foreman the night before that you need them, aren't they?

A. No, sir.

Q. 4. Well, if you do tell him, he will send them in for you, won't he, if you tell him the night before?

A. He hasn't yet.

Q. 5. Have you asked the day before to have heavy supplies of this kind sent in for you and been refused?

[fol. 590] A. No, I haven't.

Q. 6. You have never been refused. It is a fact, as I understand you, that when these supplies are unloaded at the man-station, they are taken to the particular point where you are going to need them by the gathering motor?

A. That's right.

Q. 7. And the only carrying you ever do, when you do it, is to get them into the tool car?

A. That's right.

Q. 8. Your own tools are kept on the section, as I understand?

A. Yes, sir.

Q. 9. Your place of work is all over your section?

A. That's right.

Q. 10. Wherever there is some particular work for you to do on the section, you go there and do it?

A. That's right.

Re-direct examination.

By Senator Muse:

Q. 1. How long have you been a brattice man?

A. You mean for Jewell Ridge?

Q. 2. Yes.

A. I came there in June, 1942.

Q. 3. Since you have been there, has it been customary for the brattice man to get his own supplies?

A. It has. That is, cement and plaster and things of that kind.

Q. 4. The things you have mentioned here?

[fol. 591] A. Yes, sir.

Witness stands aside.

C. F. Smith, another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Senator Muse:

Q. 1. You are Mr. C. F. Smith?

A. Yes, sir.

Q. 2. Mr. Smith, I believe you are what is known as a track man at the No. 1 Mine?

A. Yes, sir.

Q. 3. You have been working in that capacity for the Jewell Ridge Company how many years, approximately?

A. Approximately ten years.

Q. 4. You have been working around mines for approximately how many years?

A. Approximately thirty or thirty-one years.

Q. 5. How old are you, Mr. Smith?

A. Forty-two, almost forty-three.

Q. 6. You were how old when you went into the mines?

A. Between eleven and twelve years of age, I believe.

Q. 7. And have been following it ever since?

A. Yes, sir.

Q. 8. I take it the track man has charge of the track; is that correct?

A. That's correct.

Q. 9. As a track man, what time do you reach the lamp-[fol. 592] house in the morning?

A. Well, that varies. On most occasions, I would say fifteen or twenty minutes till seven.

Q. 10. You get your lamp in the same manner these other gentlemen get theirs?

A. Yes, sir.

Q. 1. As a trackman, what tools do you use?

A. We use a track adz, known as an adz, and a wrench and a spike-bar and rail bender and a ratchet to make holes in the rails,—this ratchet also includes what is known to us miners,—I never did know the real name for it, we call it a grandad, an old man that is fast ned to this ratchet.

Q. 12. Is that fastened on to the track?

A. Yes, sir.

Q. 13. What else,—do you use any drills?

A. We use what is known as a punch and a long bar that goes with this——

Q. 14. I believe you mentioned wrenches?
A. I believe I did. We use a wrench.
Q. 15. Do you use any drill bits?
A. Yes, sir.
Q. 16. How many of those do you usually use?
A. Well, that varies. Some times we have one or more of the drill bits.
Q. 17. This ratchet that you talked about, how much would that weigh, approximately? Just your best estimate on it.
A. The ratchet alone, I would say, would weigh from ten to twelve pounds, maybe more or maybe less.
[fol. 593] Q. 18. What about the grandad you spoke of?
A. Something near the same weight.
Q. 19. In other words, that combination would weigh something near twenty pounds?
A. Yes, something near that.
Q. 20. Do you have a track gauge?
A. Yes, we have a track gauge.
Q. 21. I don't believe you mentioned that?
A. I did not.
Q. 22. Where do you keep those tools that you use?
A. As a general rule, I keep them on the section where I perform my work.
Q. 23. What section do you work on?
A. Parallel and Indian Creek sections.
Q. 24. And generally speaking, you keep the tools in the section where you are working?
A. Yes, sir.
Q. 25. Do you keep any tools on the outside?
A. Not unless I bring them out for repair.
Q. 26. Do you do that occasionally?
A. Yes, sir.
Q. 27. How often would you say that is necessary?
A. Well, I would say that some times it may—well, I would say it this way, that it will average once or twice a month that I have to bring some part of the tools out to be repaired.
Q. 28. What materials do you use, as distinguished from tools?
A. I use track bolts and nuts, of course.
[fol. 594] Q. 29. Those bolts, do they come in kegs?
A. Yes, sir.

Q. 30. They will weigh approximately what?

A. I have never weighed one, but I am pretty sure they weigh two hundred pounds to the barrel.

Q. 31. Where do you get those bolts?

A. We get them at the supply house.

Q. 32. Do you have to have an order to get them?

A. I give an order to the section foreman in the evening when I quit work for the amount I may need.

Q. 33. And he turns in the order so you can get the supplies the next morning?

A. Yes, sir.

Q. 34. Do you use spikes also?

A. Yes, sir.

Q. 35. Do they come in kegs?

A. Approximately the same kind of container.

Q. 36. And approximately the same weight?

A. Yes, sir.

Q. 37. How about angle bars, do you use those?

A. Yes, sir.

Q. 38. How many of those do you take in every morning?

A. We don't take them in every morning.

Q. 39. How often do you take them in?

A. I would say once or twice a month.

Q. 40. How many do you take in?

A. Naturally, that would vary. It has always been the practice of a track man to take all the supplies he can get [fol. 595] and some times we will have ten pair and some times we will have fifty pair.

Q. 41. It depends on how many you can get?

A. Yes, sir.

Q. 42. Where do you get them, Mr. Smith?

A. At either the machine shop or the supply house. I suppose it would be called the supply house. The general supply house is at the lamp house they speak of and they have another storage house up in the hollow and that's where we usually get these spikes and bolts.

Q. 43. In your work, do you use occasionally, steel ties?

A. Yes, sir.

Q. 44. They come in bundles of five, I believe?

A. Yes, sir.

Q. 45. And weigh approximately how much?

A. I would say approximately forty to fifty pounds to the bundle.

Q. 46. Do you get those at the supply house also?

A. No, sir, we don't get those at the supply house.

Q. 47. Would you mind telling me where you do get them?

A. Well, that will vary. If the ties are new and haven't been used, I get them at a designated spot back from the portal, I will say, about a quarter of a mile, and as a rule, we get part of our ties where they have been in use and brought to the blacksmith shop for repair, and we take those back in the mine.

Q. 48. If you get ties that have been repaired, you get them from the blacksmith shop?

A. That's true.

[fol. 596] Q. 49. How far is that from where you get on the man-trip?

A. That varies. It depends on where your particular man-trip has been spaced.

Q. 50. About how far?

A. About a hundred and fifty feet.

Q. 51. If you get new ties, you say you get them about a quarter of a mile from the portal?

A. That's true.

Q. 52. How do you get them to the portal where you catch the man-trip.

A. There is a double track there, a side track there, and these ties, all I have ever gotten, I don't know, they are straight across these two tracks, and we get them and carry them across the tracks and put them in the tool car.

Q. 53. You don't have to carry them very far?

A. No, sir.

Q. 54. But you do put them in the tool car?

A. That's true.

Q. 55. Suppose you are taking in a barrel of spikes or bolts, how do you get that keg of bolts or spikes to the man-trip?

A. Well, on occasions, I borrow a wheelbarrow off the sand man, and on other occasions when I can't get it, I roll them along on the ground.

Q. 56. You have to arrange to get them from the place you get the kegs up to the man-trip?

A. That's true.

Q. 57. That's a distance of about what number of feet?

[fol. 597] A. Well, from two hundred and fifty to two hundred and seventy-five feet, I would say. I am not sure about the distance.

Q. 58. You catch the man-trip in in the same way these other witnesses have described?

A. Yes, sir.

Q. 59. And you have the same experiences they have described?

A. Yes, sir.

Q. 60. You carry your tools and equipment, and if there is anything you have to take in, you carry it on the tool car?

A. That's true.

Q. 61. Do you have something to go in practically every day or not?

A. No, sir, not every day.

Q. 62. About how frequently will you have something going in, on an average?

A. On an average, I would say about two or three times a month.

Q. 63. Do you go to the man-station in your section?

A. Yes, sir, I go to the man-station or powder house, whatever you might call it.

Q. 64. In some sections, I believe they are the same and in other sections, I believe they are different?

A. They are the same at my particular section.

Q. 65. When the man-trip reaches your station, you get off and take off your supplies?

A. Yes, sir, if I have any supplies to take off, I take [fol. 598] those off.

Q. 66. What time do you leave your man-station inside to go to work?

A. Well, I leave this man-station just as soon as I arrive there and then I walk about six hundred feet to where I leave my excessive clothes that I don't use in working and my lunch.

Q. 67. I believe you pick up your tools that you have left at the man-station the night before?

A. I don't leave my tools at the man-station.

Q. 68. Would you mind telling us where you leave them?

A. I leave them the nearest to where I think I will start my duties the next shift.

Q. 69. So you don't wait at the man-station until eight o'clock, you leave at whatever time you arrive?

A. I leave the man-trip at whatever time I arrive and go to this other destination where I leave my coats and lunch, and wait until eight o'clock.

Q. 70. The point where you leave your lunch and excess clothing, will that distance vary from the man station?

A. No, sir, it's the same place.

Q. 71. The point where you leave your lunch and excess clothes, will that distance vary from the man-station?

A. No, sir, it's the same place.

Q. 72. How far is that from the man-station?

A. I would say about six hundred feet.

Q. 73. In walking that distance from your section, do you walk up erect or bent over?

A. There is a portion of that six hundred feet I can walk [fol. 599] erect and some places I have to stoop.

Q. 74. Do you have to stoop very low?

A. A slight stoop on that particular stretch.

Q. 75. At that point where you leave the excess clothes and lunch, you wait there until eight o'clock.

A. That's true in most cases.

Q. 76. When eight o'clock arrives, what do you do?

A. I start to my designated work.

Q. 77. Wherever it happens to be in that section?

A. Yes, sir.

Q. 78. How long do you have to wait before eight o'clock at the place where you leave your clothes and bucket?

A. I would say five to ten minutes. It varies, depending on when the man-trip arrives.

Q. 79. Some times you don't have to wait at all?

A. Yes, sir.

Q. 80. And at other times, you wait longer?

A. Yes, sir.

Q. 81. You eat your lunch about the way the other men have described?

A. When it's most convenient.

Q. 82. You quit at three-thirty?

A. Yes, sir.

Q. 83. Quit work at three-thirty or are you back at the man-station at three-thirty?

A. I quit work at three-thirty. Some times I will work a few minutes over time if I have something to do to keep from knocking the other fellow off on the next shift.

[fol. 600] Q. 84. When your work is over, you go up and pick up your bucket and clothes?

A. Yes, sir.

Q. 85. And walk to the man-station?

A. That's correct.

Q. 86. These supplies you may take in and take off at the man-station, how do you get those over to the point where you are going to use them?

A. If it is heavy material, I have the gathering motor pick them up and take them to the spots where I can get them and if it is light material, I carry those.

Q. 87. What kind of material would you carry?

A. Such as five pair of these angle bars or something like that.

Q. 88. A quantity you could carry without too much trouble; is that the idea?

A. Yes, what I might need before the gathering motor could get the supplies to me. I take on some things I might need before he could get them to me.

Q. 89. Then when the day's work is over, you catch the man trip and come out about like these other men do?

A. Yes, sir.

Q. 90. In fact, you come out on the same trip, don't you?

A. That's true.

Q. 91. From the point where you get off at the man-station on your section to the point where you leave your excess clothes, do you walk in the track or on the side of the track?

A. That will depend on the entry. Of course, a part of [fol. 601] the time I walk inside and part of the time over on the side.

Q. 92. What will determine that?

A. There may be slate falls along the side and in that case, I will walk in the center of the track, and if the side is cleared up, I will walk there.

Q. 93. Do you have many slate falls?

A. Oh, yes, we have a lot of slate falls.

Q. 94. Do you know of any one who has been hurt on the man trip who hasn't been named, any new, additional ones, or do you just know about the ones who have already been named?

A. I believe it has already been mentioned where the man-trip run into the rear end of a tram trip.

Q. 95. Yes, that was mentioned.

A. I don't have any new ones to call.

Q. 96. When you are walking this distance from the man-trip down to where you leave your clothes, do you have to get off to the side to let motors pass from time to time?

A. Oh, yes.

Q. 97. Do you always have sufficient clearance to stand by the side of the track or do you have to get to a place of safety?

A. We have to get to a place of safety in parts and other places it is clear.

Q. 98. Where it is too narrow, you go to a place you think is wide enough?

A. That's correct.

Q. 99. Do you walk or ride a bus or automobile to Jewell Ridge?

A. I ride in a private automobile.

[fol. 602] Q. 100. With some one?

A. With my brother, yes, sir.

Q. 101. You have heard me ask this question of the other witnesses. The mines were working six days a week and still are, from April 1st to June 20th. Did you work the six days a week?

A. In some cases I did and some, I did not.

Q. 102. Did you usually work the six days?

A. If the work was furnished me, I worked six days, yes, sir.

Q. 103. Was it furnished you some of that time from April 1st to June 20th?

A. I wouldn't say it was from April 1st to June 20th, but there was some of the time in the past year that I was not furnished the six days a week. I would go out to work and the work wouldn't be furnished me, and I would go back home.

Q. 104. Did you work almost every day you had work?

A. Yes, sir.

Q. 105. Did you work at least five days a week during most of that time?

A. Yes, sir.

Q. 106. And some of it you worked six days, you think?

A. Yes, sir.

Cross-examination.

By Mr. Stuart:

Q. 1. You didn't work during the strikes, I suppose, did you, Mr. Smith?

A. Well, I didn't work when the mines were not running, no.

[fol. 603] Q. 2. They were not running while the strikes were going on, were they?

A. I didn't know we had had any strikes.

Q. 3. You just know the mines weren't working some of the time?

A. I knew we had work stoppages, waiting for a contract.

Q. 4. A work stoppage isn't a strike?

A. No, sir.

By the Court: What is the significance of that?

By Senator Muse: We really don't think it is under the pre-trial order. You have to go beyond the forty hours before the Wage and Hour Division takes any part in it. In the absence of that pre-trial order, if they worked less than forty hours, Your Honor wouldn't have jurisdiction of this case, although under the pre-trial order, I don't think it is a point.

By the Court: I don't think the question of whether any recovery may or may not be had determines whether there is an actual controversy, does it?

By Mr. Richardson: We alleged in our petition and they admitted the facts to be——

By Senafor Muse: We are not going to ask that question of any other witness.

By the Court: Proceed with the cross-examination.

Witness stands aside.

Sam Shell, another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Senator Muse:

[fol. 604] Q. 1. You are Mr. Sam Shell?

A. Yes, sir.

Q. 2. Mr. Shell, you are employed also by the Jewell Ridge Coal Corporation?

A. Yes, sir.

Q. 3. At the No. 1 Mine?

A. Yes, sir.

Q. 4. Have been employed for how many years, approximately?

A. Altogether since 1932, but, of course, I was gone from there from 1939 to 1943.

Q. 5. You are a track man, the same as Mr. Smith?

A. Yes, sir.

Q. 6. Work in what section?

A. Five Right in Parallel.

Q. 7. Did you hear Mr. Smith's testimony?

A. Yes, sir.

Q. 8. Do you use the same tools and equipment he uses?

A. Yes, sir.

Q. 9. Get them in the same manner?

A. All but those ties.

Q. 10. You don't use the ties?

A. Yes, sir, but they are delivered on my section to me.

Q. 11. That's the steel ties you are talking about?

A. Yes, sir.

Q. 12. Otherwise, you get your equipment in the same way he does?

A. Yes, sir.

Q. 13. And the same kind of equipment?

[fol. 605] A. Yes, sir.

Q. 14. You get to your place of work the same as he does?

A. Yes, sir.

Q. 15. And get out the same way?

A. Yes, sir.

Q. 16. When eight o'clock comes, where are you usually?

A. I am at the man-station. That's where I leave my bucket and jacket.

Q. 17. And about how long does it take you to get from the man station to where you work, usually?

A. About five minutes, usually.

Q. 18. And five minutes to return?

A. Yes, sir.

Q. 19. What's the height of the roof in Parallel?

A. On the main line, it generally runs five or six feet, but up on the entries, it gets smaller on account of the rock.

Q. 20. Most of your work is on the section?

A. Yes, sir.

Q. 21. What's the height over there?

A. Around forty-eight inches.

Q. 22. You walk under that height?

A. Yes, sir.

Q. 23. You get out of the mine the same as the other men, on the man-trip?

A. Yes, sir.

Q. 24. And the conditions under which you work are very similar to the conditions under which Mr. Smith works?

[fol. 606] A. Yes, sir.

No cross-examination.

Witness stands aside.

Wesley Johnson, another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Senator Muse:

Q. 1. You are Mr. Wesley Johnson?

A. Yes, sir.

Q. 2. Look towards the Judge and talk loud enough for all of us to hear you without straining ourselves. I believe you are what is called a wire man?

A. Yes, sir.

Q. 3. What does a wire man do? Let's see what your duties are principally?

A. The first thing I do——

Q. 4. Is it true that the wire man is a man who strings the electric wire?

A. Yes, sir.

Q. 5. Like the trolley wire?

A. Yes, sir.

Q. 6. That's your principal duty, stringing and repairing trolley wire?

A. Yes, sir.

Q. 7. You get to the lamp house about what time?

A. About six-thirty, I guess, or twenty minutes to seven.

[fol. 607] Q. 8. You get your lamp the same way everybody else gets theirs?

A. Yes, sir.

Q. 9. Mr. Johnson, in your work, give me a list or description of the names of the tools you use in your work. Have you made a list of them?

A. No, I don't have a list of them made.

Q. 10. Call them off, and I will see if I can check them.

A. I have a tool-bag in which I carry my small tools in, such as bell wrench and clip wrench and hammer.

Q. 11. What size hammer?

A. It will weigh about a pound and a half or two pounds.

Q. 12. All right.

A. A couple or three bits, maybe, to drill hanger holes with, and also a hatchet and a brace and bit that I carry in the tool-bag.

Q. 13. All right, sir.

A. Then I have a pair of pliers and a Stilson wrench and a small wrench that I carry on my belt, and we have a chain block.

Q. 14. How much does that chain block weigh, Mr. Johnson?

A. I imagine it will weigh about fifteen or twenty pounds, something like that. I don't know just what it would weigh.

Q. 15. All right.

A. We have a set of comalongs.

Q. 16. What's a comalong?

A. That's a thing you put on the wire that clamps on [fol. 608] the wire where you have two ends to make a splice.

Q. 17. Where you have the wire broken?

A. Draw it together with the chain block; the chain block has got a hook on each end and that's what we call a comalong. I believe the right name of them would be a Haven grip.

Q. 18. How much does that thing weigh, this comalong, approximately?

A. They weigh, I imagine, about seven pounds.

Q. 19. Do you have a blow-torch?

A. Yes, sir, have a blow-torch.

Q. 20. How about solder?

A. Yes, sir.

Q. 21. How much solder do you have?

A. A couple of pounds, maybe.

Q. 22. Do you have a soldering iron?

A. No, sir.

Q. 23. How do you melt that solder?
A. With the blow-torch.
Q. 24. Do you have a drill?
A. Yes, sir.
Q. 25. How much will it weigh?
A. Twenty pounds, I guess.
Q. 26. Do you have a hacksaw?
A. Hacksaw.
Q. 27. Hacksaw blades?
A. Yes.
Q. 28. Have a handsaw?
A. Have a handsaw.
[fol. 609] Q. 29. Do you have an axe?
A. No, sir, nothing but the hatchet is all I have.
Q. 30. How about some hangers?
A. Yes, sir.
Q. 31. What is a hanger, any way?
A. It's a complete thing you put in the top to hold your trolley wire.
Q. 32. A thing you place in the roof that comes down and catches on the trolley wire?
A. Yes, sir.
Q. 33. Do you take some of those in every day?
A. No, not every day.
Q. 34. How many times a week do you take one in or how many times a month?
A. It's according to what I have got to do.
Q. 35. I mean on an average. Do you take some in once a week or every two weeks or how often?
A. I imagine it would average about once a week.
Q. 36. These tools, how often do you take those in with you?
A. Every day, except the blow-torch. I don't take it every day.
Q. 37. How about the drill, do you take it every day?
A. Yes.
Q. 38. Do you take the hatchet every day?
A. Yes, sir.
Q. 39. And the chain block?
A. Yes, sir.
[fol. 610] Q. 40. The comalong?
A. Yes, sir.
Q. 41. The wire splicers?
A. Yes, sir.

Q. 42. The hacksaw?
A. Yes, sir.
Q. 43. Hammer?
A. Yes, sir.
Q. 44. Bell wrench?
A. Yes, sir.
Q. 45. Clip wrench?
A. Yes, sir.
Q. 46. Brace and bit?
A. Yes, sir.
Q. 47. The handsaw?
A. I don't carry the handsaw every day.
Q. 48. You take all these others in with you every day?
A. Yes, sir.
Q. 49. Where do you keep them at night?
A. I bring them to the machine shop We have a cabinet at the machine shop.
Q. 50. Do you have a helper?
A. Yes, sir.
Q. 51. After you get your lamp, do you go get these tools?
A. Yes, sir.
Q. 52. Does your helper go with you?
A. Yes, sir, he goes right along with me.
Q. 53. Are you and your helper able to carry all these tools and equipment on one trip?
[fol. 611] A. If we take the ordinary tools we work with out, we can take them all on one trip, but most of the time we have to gather up hangers and have to bring wire.
Q. 54. Do you take the wire in?
A. Yes, sir.
Q. 55. In what lengths?
A. One hundred and fifty to two hundred feet.
Q. 56. Is that copper wire?
A. Yes, sir.
Q. 57. How often do you have to take wire in, Mr. Johnson?
A. We hang the headings about, I would say, about every two or three months. We hang about two hundred and fifty feet, try to hang that much so we don't go back so often.
Q. 58. So you don't take the wire in so often?
A. No.
Q. 59. These other tools, I understand you take them in and bring them out every day?
A. Yes, sir.

Q. 60. Do you ride the man-trip in?

A. Yes, sir.

Q. 61. The same man-trip the other men have spoken about?

A. Yes, sir.

Q. 62. Carry your tools in the tool car?

A. Yes, sir.

Q. 63. Do you work in any particular section or all over the mine?

A. I work all over the mine.

Q. 64. From whom do you get your orders as to where you [fol. 612] shall work?

A. The mine foreman.

Q. 65. In the morning?

A. Yes, sir.

Q. 66. Before you leave on the man-trip?

A. Yes, sir.

Q. 67. Does he tell you, "Mr. Johnson, today you shall work in Parallel", or whatever section he wants you to work in?

A. Yes, sir.

Q. 68. Then you catch the cars on the man-trip going to that section?

A. Yes, sir.

Q. 69. Suppose you were working in Parallel Section—that's the one I remember so well, where would you take your tools and stuff off the man-trip?

A. Take them off at the man-station where the rest of the men unload at.

Q. 70. How do you get your equipment from the man-station to the particular point where you are going to work?

A. It depends on what I am going to do. If I had a break down and the motor couldn't get the empties placed up, I would go fix that, and if I was going to hang wire, I would leave my tools and let the motor bring them on up.

Q. 71. If you were in no particular hurry, you would walk up?

A. Yes.

Q. 72. At what point do you leave the man-station for whatever place you are going to work that day, what time? [fol. 613] A. It is according to what I am going to do. Some times I send my buddy on with the drill and I stay with the stuff and ride on up on the motor.

Q. 73. You use whatever method seems to be the most convenient and proper at the time to get your stuff up to where you are going to work?

A. Yes.

Q. 74. When your day is over with, do you get your tools up and get them back out on the man-trip the same way you came in?

A. Yes.

Q. 75. You go back out of the mine the same as everybody who rides the man-trip?

A. Yes, sir.

Q. 76. How much would you say all the tools you carry in and out every day would weigh, the best you can estimate?

A. They weigh around a hundred and twenty-five, I guess.

Q. 77. One hundred and twenty-five pounds?

A. Yes.

Q. 78. What time does your pay start?

A. Starts at eight o'clock.

Q. 79. You take off at lunch time about like these other men?

A. Yes, sir.

Q. 80. Any time it suits you?

A. Yes, sir.

Q. 81. Do you take your lunch-box with you or leave it at the man-station?

[fol. 614] A. I generally leave it where I think I will get to it.

Q. 82. You leave it about where you think you are going to be, is that it?

A. Yes, sir.

Q. 83. What time do you quit work?

A. Three-thirty.

Q. 84. And you walk back to the man-station and take your tools?

A. Yes, sir.

Q. 85. And your work time begins at eight and quits at three-thirty, with thirty minutes off for lunch?

A. Yes, sir.

Q. 86. Are you usually away from your man-station in the section where you are working before eight o'clock or do you stay there until eight?

A. No, like I told you, if I have a breakdown, I never pay any attention to the time. I go and get the place fixed up.

Q. 87. You pay more attention to the work you have to do than the time of day?

A. Yes, sir.

Q. 88. If it is necessary or desirable to start away from the man-station before eight o'clock, you do so?

A. Yes, sir.

Q. 89. And working all over the mine, you, of course, work under whatever conditions happen to exist in the particular section?

A. Yes, sir.

Q. 90. You have to adjust yourself to the height of the [fol. 615] roof wherever you happen to be?

A. Yes, sir.

Q. 91. In working all over the mine, you come in contact with whatever condition exists in the mine?

A. Yes, sir.

Q. 92. That's true as to the height of the roof or any other condition?

A. Yes, sir.

Cross-examination.

By Mr. Stuart:

Q. 1. Mr. Johnson, you are the wire man for No. 1 Mine?

A. Yes, sir.

Q. 2. You are in charge of the wire work for the whole mine, aren't you?

A. Yes, sir.

Q. 3. How many men do you have to help you in your work?

A. I have two at the present time.

Q. 4. You have two helpers, and some times when you need him, you have another one?

A. Yes, sir.

Q. 5. You may have three?

A. Yes, sir.

Q. 6. Now, in order to get to the place where you have got a piece of work to do, with your crew, how do you get into the mine and go to that place where you are going to work and take your equipment?

A. It used to be the way we got in, we rode the man-trips up to the last couple of months, maybe three months, I don't [fol. 616] know just how long, and we have a motor now.

Q. 7. You have got a little motor, haven't you, which is small, and for the use of you and your crew?

A. Yes, sir, we do have now.

Q. 8. And that's been the system for several months?

A. I don't know just how long. Don't remember just how long we have had the motor. It's been two or three months. I don't know just exactly how long we have had it.

Q. 9. Hasn't it been longer than two or three months, Mr. Johnson?

A. I wouldn't know, to tell you the facts about it.

Q. 10. You use that little motor, and on it you carry your tools and your supplies and you and your helper ride it to get wherever you are going to go to work, isn't that it?

A. We do.

Q. 11. If you have to get supplies at a particular point outside the mine, you run your motor down to the nearest point to that building and get your supplies, whatever they are?

A. We do.

Q. 12. And the same way, you run it to the machine shop to get your tools?

A. No; I don't run in the machine shop and get the tools.

Q. 13. Where do you keep your tools?

A. We keep the tools in the machine shop in a cabinet but we carry the tools out to the motor.

Q. 14. I suppose you run as near as you can get, don't you?

[fol. 617] A. The machine shop and motor barn is all in together, not very far apart.

Q. 15. They are all part of the building, aren't they?

A. Yes, sir.

Q. 16. So you have your helpers and between you, you bring these tools and put them on the motor, and you leave in time to get to the particular place where you are going to be at work by eight o'clock?

A. I do now, yes.

Q. 17. Ordinarily, you will start in something like seven-thirty?

A. Around that time.

Redirect examination.

By Senator Muse:

Q. 1. Between April 1st and June 20th, were you riding the man-trip in or riding the separate motor?

A. That's what I have just been trying to think, whether we were or not.

By the Court:

Q. 2. You say you don't know?

A. No, I don't remember.

Witness stands aside.

By Senator Muse: With that witness, we have concluded, I think, as to the No. 1 Mine. I think the process will be shorter, but we will take the No. 2 Mine now.

By the Court: All right, let's proceed.

[fol. 618] J. G. McFall, another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Senator Muse:

Q. 1. You are, Mr. J. G. McFall?

A. Yes, sir, John George McFall.

Q. 2. You work in No. 2 Mine?

A. Yes, sir.

Q. 3. Have you ever worked in No. 1 Mine?

A. No, sir.

Q. 4. You are a coal loader?

A. Yes, sir.

Q. 5. What process do you have over there at No. 2 Mine about getting your lamp?

A. We get our lamp at the lamp house with a check; turn the check in to the lamp man and he gives us a lamp.

Q. 6. The same as the witnesses have testified at No. 1?

A. Yes, sir.

Q. 7. How long does it take you to get your lamp?

A. That depends. If I get up to the mine and there is no one there, I immediately go up and get my lamp.

Q. 8. In which section do you work?

A. In this period from April 1st to June 2, I worked on Second North Butt-off off Main East.

Q. 9. Second North Butt-Off?

A. Yes, sir.

Q. 10. How far is that approximately from the portal, as you would guess?

[fol. 619] A. I would guess it is approximately a mile and three-quarters.

Q. 11. Do you ride a man-trip over at No. 2 Mine?

A. Yes, sir.

Q. 12. How are the man-trips made up over there?

A. At this period of time——

Q. 13. Do you have a man-trip for each section?

A. Yes, sir, at that period, they did.

Q. 14. Had a separate man-trip for each section?

A. Yes, sir.

Q. 15. And you, going in on a man-trip, would take the man-trip going to your section?

A. Yes, at this particular time, there were two man-trips connected together. One motor pulled the trip and the other motor tailed it.

Q. 16. Did that man-trip then divide?

A. Yes, sir.

Q. 17. One motor took some of the cars to one place and the other motor took the cars to the other section?

A. Yes, sir.

Q. 18. In other words, they used the tailing motor for the purpose of taking some of the cars up into a particular section?

A. Yes, sir. The Main East Motor, if he was in the lead, he would take his trip, all the trip, it run from eight to twelve cars, and he would take it and pull it on by our dead-end, and if there wasn't a big string of empties in this Second North Butt-Off, our motor would go in this section and we would unload out of the cars and the main [fol. 620] east man-trip would continue on its journey and our motor would come out and take our man-trip and pick up his empties wherever he would get them from and proceed on.

Q. 19. Do you have a tool-car on that man-trip?

A. Yes, sir, one tool car on the man-trip and we unload our tools and get our designated tool-car, the first car behind the motor on the man-trip.

Q. 20. Did your section foreman ride in the cars with you all going to that section?

A. Yes, sir, he rode our man-trip.

Q. 21. Who gave the orders on the outside to start the man-trip?

A. It was generally either the dispatcher or the mine foreman, or some times the section foreman told the motorman to go on.

Q. 22. Did you go in the mine in the same way the other men have described it here?

A. Yes, sir, we rode the man-trip in the mine.

Q. 23. Did the section foreman give any orders to the men as to what they should do while you were on the trip in?

A. He would probably tell the track layer some piece of track he wanted him to fix or some times he would check the men up by looking at them. He didn't call any roll, but he would look at them and see some one off, or tell some one you might work at this particular place, say "Mack, I want you to work the breakthrough today, you are ahead of the air, and you work the breakthrough".

Q. 24. He gave such orders as he deemed necessary?

[fol. 621] A. As he deemed necessary for the production of coal, sure.

Q. 25. On the man-trip, in what position did you ride in those cars?

A. This is approximate with me, I wouldn't argue with the map, but approximately a mile and a quarter we could ride on the bench sitting up pretty straight.

Q. 26. Do you have the same type of cars they have at No. 1?

A. I don't know. I have never worked at No. 1.

Q. 27. Do you have the "mourner's bench" at No. 2?

A. Yes, sir.

Q. 28. And down in the middle is a depressed place with a little offset running along the side?

A. Yes, sir.

Q. 29. That you call the mourner's bench?

A. Yes, sir.

Q. 30. Most of the men sit there?

A. Up until we hit the low top and it wasn't so comfortable to ride there.

Q. 31. Are you able to sit on the mourner's bench?

A. You can sit there if you sit with your head in this position?

Q. 32. How far would your head be from the roof?

A. It's not so far. They went through what we call a swag and up a steep hill and from there on it was very ununiform and the sand rock come down and you had to get down again. If you didn't, you would get your head bumped.

[fol. 622] Q. 33. Have any men you know of over there ever got hurt on the man-trip?

A. Yes, sir.

Q. 34. Mention some of them?

A. The only one I particularly know was Dave Adams.

Q. 35. How was he hurt?

A. We were coming out of an evening. We didn't have to wait. They didn't pull both man-trips with two motors. Our motor would make his trip up and we didn't wait on Main East.

Q. 36. When you finished in the afternoon, your man-trip would make up and come on out?

A. Yes, sir. We were coming out this evening and come to this steep hill I just mentioned and there was three cars on this trip, our motorman had three empties on the trip, and the main line tram had left a siding at the foot of the hill in the swag and the motorman said he didn't see the trip and none of us coal loaders knew it was sitting there until we hit it.

Q. 37. When was that?

A. That was approximately about the tenth day of this last May.

Q. 38. Was he hurt badly?

A. He was cut over his right eye, I believe, and in the force of it, it injured his neck to some extent, that he didn't work for about ten days.

Q. 39. Do you know of anybody else who has been hurt?

A. A fellow in the car ahead of him, named Claude Fentress, he didn't lose no time, it swolled his eyes and his nose was bloody, but he didn't lose any time.

[fol. 623] Q. 40. Do you know of anybody else who has been hurt on a man-trip over there?

A. That's all I personally know of.

Q. 41. At what point do you get off the man-trip?

A. It branches off and then we get in our man-trip and ride down in on the section to about, I would estimate, five to six hundred feet of my working place.

Q. 42. In other words, you get off on your section when you are within five or six hundred feet of the place you actually dig coal?

A. Yes, sir.

Q. 43. From that point on down to where you dig coal, what is the height of the roof?

A. I have heard the engineers measure the coal over time and again and they rate it thirty-six inches, but as they said before, this draw rock runs from nothing to six inches and the top would vary with the amount of draw rock but the coal would average about thirty-six inches high.

Q. 44. That should give you what height roof?

A. I take it it would average up thirty-eight or thirty-nine inches.

Q. 45. In traveling this five or six hundred feet down to where you actually dig coal, did you have to walk in such a stooped position as to permit you to pass under that roof?

A. Yes, sir, certainly you had to do that.

Q. 46. In doing so, did your back practically touch the roof?

A. Yes, sir, you would touch it going down through there. [fol. 624] Q. 47. You wore just an ordinary miner's jacket?

A. Yes, sir, I wore just an ordinary jacket.

Q. 48. In walking that distance, would you wear out the top of your jacket?

A. Yes, sir.

Q. 49. Your working place had the same height roof, I take it, as the five hundred feet you walked?

A. Yes, it was about the same. I was driving what is called an air-course. Of course, we walked the main entry until where it got down to the section where my place was.

Q. 50. In walking down to your working place, illustrate how you walked?

A. You had to go in a position something like this. Ordinarily we had a lunch bucket which we carried. I always carried it in my left hand and a cap-wedge in my other hand like this.

Q. 51. This cap-wedge, what's that?

A. It's a bar used over the top of the timber and I would walk something like this, with my own weight on the cap-

wedge and the bucket here, and I had to walk something like that.

Q. 52. That's the way you walked to your working place after getting off the man-trip?

A. Yes, sir.

Q. 53. From the point you walked after you got off the man-trip down to your working room, was that roof lower than it was before you got off the man-trip?

A. It was just about—I would say it was a variation on the main line, as I explained before, but after we branched [fol. 625] off, there was a distance down, I couldn't estimate, probably two hundred feet, where the rock had been shot, and it was fairly good walking, but the rest of the way, I would say, was just about average.

Q. 54. How far would you say the rest of the way would be approximately?

A. That we rode the man-trip and walked together?

Q. 55. Yes.

A. I judge some where between twelve and fifteen hundred feet, just a rough estimate of it.

Q. 56. Have you ever had any slate falls over in your section in No. 2 Mine?

A. Yes, sir, we have had slate falls.

Q. 57. In places have you seen where they have marked with a cross on the roof, indicating bad roof?

A. Yes, sir, I have seen lots of it.

Q. 58. After that was done, would these cross-marks stay there some times for weeks before the roof was removed?

A. Yes, sir, on this particular section it got so bad, the section foreman told me they had to stop the place and take the rock down and they haven't started it back up again. That was the 15th of July.

Q. 59. Would that rock fall with the cross-mark on it?

A. I have saw it fall, but not so often.

Q. 60. Occasionally?

A. Yes, sir.

Q. 61. In coming back out, you came on a man-trip and went to the lamp house?

[fol. 626] A. Yes, sir.

Q. 62. Did you have any delay in getting out?

A. We would have some delay some times. Have a wreck some times, nothing unusual to have a wreck and some times be held up at the dispatcher's office on account of some trouble they had with the tram.

Q. 63. In coming out, did the man-trips have priority or did the coal trips have priority?

A. Most of the time in that mine the main line trams was gone and we didn't hardly ever run into them, but occasionally, they was tied up and we had to wait.

Q. 64. Generally speaking, you came on out?

A. Yes, sir.

Q. 65. What time did you leave in the morning going into the mine?

A. We would leave at approximately seven-thirty, some times a little before at some times a little after, but approximately seven-thirty.

Q. 66. And you would get to your working place when?

A. That varied. The main line tram would store empties——

Q. 67. I know, but what time?

A. We were down in there at eight or eight-ten. I have seen it as high as nine, when something happened, but generally we got to our section at eight o'clock.

Q. 68. That was the time you began working?

A. That was the time I began work when I thought I was accomplishing something out of it.

Q. 69. That was when your pay started?

[fol. 627] A. Yes, sir.

Q. 70. Was that the time the company's rules required you to start digging coal?

A. Yes, sir, that was our starting time.

Q. 71. Or do anything else you could do in your room?

A. Yes, sir.

Q. 72. In order to get ready to load coal, did you have to do the same things the coal loaders testified in No. 1 Mine, set timbers and clean up some?

A. We load our bugdust as coal and we got paid the regular tonnage rate for loading it, and ordinarily, we wouldn't throw our dust back any more than just to clean the breakthrough.

Q. 73. In other words, at No. 2 Mine, you loaded the bugdust made by the cutting machine?

A. Yes, sir.

Q. 74. And loaded that with the coal and got paid for it?

A. Yes, sir.

Q. 75. And you would load the bugdust and set such timbers as you had to set?

A. Yes, sir.

Q. 76. In order to get to the point of loading coal in cars, you had to go through practically the same proceeding the other boys have testified to?

A. Yes, sir.

Q. 77. Except loading the bugdust?

A. Yes, sir.

Q. 78. You were paid over in No. 2 at so much a ton?

A. Yes, sir.

[fol. 628] Q. 79. And you ate lunch when it was convenient?

A. At odd times when I didn't have anything else to do.

Q. 80. Coming back out, did you walk back the five or six hundred feet to the man-trip station?

A. Yes, sir.

Q. 81. Carry your tools?

A. If I had any tools that needed repairing, I would carry them with me.

Q. 82. Under the rules of the company, you began performing manual work in your room at eight o'clock?

A. Yes, sir.

Q. 83. And quit at three-thirty?

A. Yes, sir.

Q. 84. Took thirty minutes off for lunch?

A. Yes, sir.

Q. 85. And you went in around seven-thirty and got out at about what time, generally speaking?

A. Generally speaking, it was around four; it might be a little before or a little after, but approximately four o'clock.

Q. 86. In the walking you had to do over there as you have described it, did you walk between the rails or on one side?

A. That depends. We was always looking for low places in the bottom and high places in the top.

Q. 87. And if the low places in the bottom and the high places in the top were on the outside of the rail, you stepped over there?

A. Yes, sir.

[fol. 629] Q. 88. Trying to give yourself as much space as you could?

A. Yes, sir.

Q. 89. It may not be clear,—after you left the main line man-trip, and your man-trip divided?

A. Yes, sir.

Q. 90. And you started down, in what position did you ride then, on the mourner's bench or in the middle of the car?

A. No, sir, I didn't sit on no mourner's bench. I would sit this way and double my feet and it wasn't such a strain.

Q. 91. In sitting in the middle of the car, did you have to lean over?

A. Yes, sir.

Q. 92. Describe that?

A. If I would sit in the middle of the car, we generally rode in about that position, stooped position.

Q. 93. You rode the coal cars in and out?

A. Yes, sir.

Q. 94. Were those cars in the same position as you heard the coal loaders at No. 1 describe them?

A. Yes, sir. At this particular time, they set out and took the weather, whatever the weather might be.

Cross-examination.

By Mr. Stuart:

Q. 1. They bring the empties in at night and store them on the section, don't they?

A. You mean the empties to be loaded the next day?

Q. 2. Yes.

A. At this particular time, the main line tram would [fol. 630] bring the empties up there and leaves us forty or maybe more than that, setting on our track where we have to go down, and when these mains went by there, it was necessary to clear that track and our motor would drop down and get them and couple on to them and take the empties in behind him on to the section as he went.

Q. 3. You shoot your coal over at No. 2 with Cardox?

A. Yes, sir.

Q. 4. And that's delivered to you at your working place with a motor?

A. Yes, sir, it's brung to us with a motor.

Q. 5. And the bugdust over at No. 2 is coal, isn't it?

A. Yes, sir, we load it for coal and get paid for it by tonnage rates.

Q. 6. The cut over there is right through the coal itself?

A. Yes, sir.

Q. 7. While at No. 1, there is some rock and the cut is through the rock?

A. I don't know, sir. No. 2 is all I ever worked on that job.

Q. 8. You made the top record over there loading the last quarter, didn't you?

A. According to the record—the company, prints the Jewell Valley Journal, and it showed that I made the record.

By the Court:

Q. 9. You don't dispute it?

A. We have some mighty good coal loaders over there.

By Mr. Stuart:

[fol. 631] Q. 10. You ran an average of $15.62 a shift?

A. Thank you for telling me. I don't know.

Q. 11. You don't dispute that, do you?

A. I don't dispute it. I haven't figured it out and I will take those figures to be correct.

Witness stands aside.

C. F. Clark, another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Senator Muse:

Q. 1. You are Mr. C. F. Clark?

A. Yes, sir.

Q. 2. Mr. Clark, I believe you are a coal loader at No. 2 Mine?

A. That's right.

Q. 3. What section do you work in?

A. I work on Two and Three East off of Four South.

Q. 4. You get into the mine and out of the mine just as Mr. McFall has described?

A. Practically the same way.

Q. 5. And your duties are a coal loader?

A. Yes, sir.

Q. 6. You have heard Mr. McFall testify?

A. Yes, sir.

Q. 7. You and he work in the same mine?

A. Yes, sir, we work in the same mine.

[fol. 632] Q. 8. On different sections?

A. Yes, sir.

Q. 9. Are your duties as a coal loader very similar to Mr. McFall?

A. I was pulling pillars at this time and he was in solid work.

Q. 10. You were pulling pillars and let the roof fall in, if necessary?

A. Yes, sir.

Q. 11. Your job was pulling the pillars and that was the last of the coal?

A. Extracting the last of the coal.

Q. 12. You were on retreat?

A. Yes, sir, that's what they call it.

Q. 13. Your duties, however, were substantially the same as his?

A. Yes, sir.

Q. 14. Your getting in and out of the mine was practically the same?

A. Practically the same.

Q. 15. Do you know whether the section bosses on the man-trips would give orders to the men as to what to do?

A. If they saw fit to give orders, they give them.

Q. 16. Have you heard them give orders?

A. They would tell a man what they wanted him to do. If the occasion arose, they would tell him any where.

Q. 17. Have you heard them tell them on the man-trips?

A. Yes, sir.

[fol. 633] Q. 18. Do you know of anybody being injured on the man-trips except the one Mr. McFall testified about, any additional ones?

A. I only know of those I have heard. I have not actually seen any one injured but over there, there might be a man killed and we won't see it or actually see the man, but we will know that it has been done.

Q. 19. Name some of those you have heard of being injured on the man-trips in recent months?

A. Recently?

Q. 20. Yes.

A. I knew, of course, of Mr. Adams, but it has been some time since I knew of a man being injured. Something like—in length of time?

Q. 21. Yes.

A. It's been three or four years, something like that. I didn't keep a record of it, but there was a man-trip wreck over there, run into a coal trip and the best I recall, there was,—I know those fellows were injured but I didn't see them injured,—there was Charley Adams, I believe he is now in the Army, and I believe he was on this same trip. I know the motorman that was running the trip but I don't know who it was injured. There was an Anders, I believe, Colonel Anders, I believe that's correct.

Q. 22. Are there any others that you know of who were injured on a man-trip over there?

A. I know of another fellow that was injured, or I don't know whether he was actually injured but the accident happened to him on this trip, but I think one of the other [fol. 634] boys knows more about it than I do.

Q. 23. Who is that?

A. Mr. Keen.

Q. 24. Otherwise, your duties and experience in that mine are no different from that given by Mr. McFall?

A. The same.

No cross-examination.

Witness stands aside.

At this point, it being 1:00 o'clock P. M., a recess was taken until 2:00 o'clock P. M., at which time the trial of this case was resumed.

Josh Keen, another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Senator Muse:

Q. 1. You are Mr. Josh Keen?

A. Yes, sir.

Q. 2. Mr. Keen, you are a coal loader at No. 2 Mine?

A. That's right.

Q. 3. In what section?

A. I work down in Peake's Branch.

Q. 4. You get into the mine and out about like these other witnesses who have testified?

A. That's right.

Q. 5. There is no difference in your getting in and getting out over there, I take it?

[fol. 635] A. Nothing only I go outside and come in again and they don't.

Q. 6. The trip you ride comes out of the mountain and goes back in?

A. That's right.

Q. 7. But so far as your moving in and out, it is similar to the other men?

A. Practically the same.

Q. 8. Your method of coal loading is practically the same?

A. The same as Mr. Clark. I worked pillar sections.

Q. 9. Is the section foreman in charge of the man-trip?

A. Yes, sir.

Q. 10. Does he give orders to the men on the man-trip?

A. Yes, sir, all the time.

Q. 11. Did I understand you to say that he does? I didn't understand you.

A. Yes, sir.

Q. 12. Mr. Keen, do you know of anybody being hurt or injured on the man-trip?

A. Yes, sir, I got hurt slightly on the man-trip.

Q. 13. How long ago?

A. In the winter of 1939.

Q. 14. How were you hurt?

A. I was riding in a trip and the tram lost a car off and the motor run into it, and I had my head down and hit my head against the side of the car.

Q. 15. Did you lose any time?

A. No, sir.

[fol. 636] Q. 16. Do you know of anybody else who was hurt on a man-trip?

A. Mr. Andrew White, he thought something bit him or stung him one. The doctor didn't know, I don't think, but he lost, I will say, three of four days.

Q. 17. Did that happen on the man-trip?

A. Yes, sir.

Q. 18. Were you on that same man-trip?

A. Yes, sir.

Q. 19. When you come out of the mine, you get rid of your lamp the same way the others do?

A. That's right.

Q. 20. So far as your activities are concerned, they are

substantially the same as the other coal loaders in that mine?

A. Practically the same.

No cross-examination.

Witness stands aside.

JAMES WOOD, another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct-examination.

By Senator Muse:

Q. 1. Is your name Wood or Woods?

A. Wood.

Q. 2. James Wood?

A. James Wood.

Q. 3. I believe you are a track man at No. 2 Mine?

A. Yes, sir, my regular work is track man.

[fol. 637] Q. 4. You have been working there how long?

A. Since 1938, December.

Q. 5. As a track man all that time?

A. No, sir, I have loaded some coal when I first went in there.

Q. 6. How long have you been a track man?

A. About three years.

Q. 7. Were you in the court room when the track men from No. 1 Mine testified?

A. Yes, sir.

Q. 8. You heard them testify?

A. Yes, sir.

Q. 9. Do you use the same tools they use?

A. Yes, sir.

Q. 10. Do you handle the tools in the same way?

A. Yes, sir.

Q. 11. Take them back and forth in the same way?

A. Yes, sir.

Q. 12. Is there any difference in the work you do as a track man in No. 2 Mine from the work they described themselves as doing in No. 1 Mine?

A. I don't know what about the machine. We lay track after a machine. I don't know whether they do or not.

Q. 13. Explain the difference.

A. A track machine, you lay your track.

Q. 14. Do you mean a cutting machine?

A. Cutting machine on the track. It cuts off from the track.

[fol. 638] Q. 15. A cutting machine that cuts off the track?

A. Yes, sir. We lay our track in four or five feet of the face and you take a machine that unloads off the truck, you leave your track back at least six feet.

Q. 16. You bring your track up closer to the face so the machine can stay on the track and still cut?

A. Yes, sir.

Q. 16. With that exception, is there any difference between what you do as a track man in No. 2 Mine and what these men did as track men in No. 1 Mine?

A. No, sir.

Q. 17. How about reporting, who do you report to?

A. I report to the section boss.

Q. 18. Before you go into the mine or after?

A. No, sir, after I go in the mines part of the time and part of the time on the outside.

Q. 19. Do you go in on the man-trip?

A. Yes, sir.

Q. 20. Do you put your tools in the tool-car as the men described at No. 1 Mine?

A. Yes, sir.

Q. 21. How close does the man-trip take your tools to where you will actually use them?

A. They take them about five hundred and fifty feet to the first working place.

Q. 22. How do you get them that five hundred and fifty feet?

A. I carry them.

Q. 23. Do you have a helper?

[fol. 639] A. Yes, sir.

Q. 24. To help you carry them?

A. Yes, sir.

Q. 25. Do you go in the mine about seven in the morning?

A. It varies.

Q. 26. About what time do you go in?

A. We go in from about ten after seven to seven-thirty, something like that.

Q. 27. What part of the mine are you usually in at eight o'clock?

A. At my working place.

Q. 28. Do you get off at the man-station inside?

A. No, sir, the man-station is out at the mouth of the entry, which they haul the men now down into the mouth of No. 9 Room on that section.

Q. 29. I am talking about what you were accustomed to doing?

A. We had to get off at the mouth of the entry.

Q. 30. And from there, you had to walk down and carry your tools?

A. Yes, sir.

Q. 31. Am I correct in that?

A. Yes, sir.

Q. 32. In walking that distance, what is the height of the top?

A. There is some of it,—it varies all the way down the entry.

Q. 33. About what is the average?

[fol. 640] A. Where the top has fell out, you have got pretty nice walking, and where it has not, it is filled with cross-collars and is low.

Q. 34. How low?

A. It will run around forty inches.

Q. 35. And you have to walk that low?

A. Yes, sir.

Q. 36. What do you call it, the cut-off where you leave the main man-trip?

A. We cut off at Five East.

Q. 37. You used some expression to describe where you got off the man-trip?

A. At that time, we got off at the man-station, and we had to — the first walking place, it must have been around twelve to thirteen hundred feet to walk.

Q. 38. With the roof varying in height from——

A. From about forty inches on up to six feet.

Q. 39. And you and your helper would carry your tools that distance?

A. Yes, sir.

Q. 40. Where were you at eight o'clock in the morning?

A. Most of the time we was always at our working place to start work at eight o'clock.

Q. 41. You would have ridden the man trip in as far as it was going, and gotten off and walked the distance over to where you were going to start to work?

A. Yes, sir.

Q. 42. And at eight o'clock, do I understand you were usually up at the place where you were going to perform [fol. 641] physical work?

A. Yes, sir.

Q. 43. At what time do you leave the place where you actually perform physical work?

A. After the work?

Q. 44. Yes.

A. At three-thirty.

Q. 45. Did you reverse the process and walk back and catch the man-trip?

A. Yes, sir.

Q. 46. What did you do with the tools?

A. We always leaved them at a convenient place to where we would think we would start at the next morning, if there wasn't some unnecessary work the section foreman wanted done.

Q. 47. Would the section foreman give you orders while he was on the man-trip?

A. Yes, sir, he has.

Q. 48. Is that anything unusual for him to give orders on the man-trip?

A. No, sir.

Q. 49. Were you in the court room when the witnesses testified about the section foreman at No. 1 calling the men down if they horse-played or got off while the man-trip was moving or got on while the trip was moving?

A. Yes, sir.

Q. 50. Does that same condition exist over at No. 2?

A. Yes, sir, it does.

Q. 51. After you leave the main entry to go to the place [fol. 642] where you started working, what was the condition of the place in so far as height was concerned?

A. The height was very well.

Q. 52. In riding on these man-trip cars, did you sit on the mourner's bench?

A. Yes, sir.

Q. 53. Did you have to duck over?

A. Yes, sir.

Q. 54. Illustrate how?

A. About like this.

Q. 55. That's true in the main entrance?

A. Yes, sir.

Q. 56. After you leave the main entrance, how about it?

A. If you rode on up into the working place, you would have to get down off the mourner's bench or lay down in the car.

Q. 57. I understand you walk up in the working place?

A. Yes, sir.

Q. 58. Were you ever hurt on a man-trip?

A. No, sir.

Q. 59. Do you know of anybody who has been hurt other than those who have been mentioned?

A. No, sir.

Q. 60. You can't add anything to it?

A. No, sir.

Cross-examination.

By Mr. Stuart:

Q. 1. Mr. Wood, I believe you said your work is on a section?

[fol. 643] A. Yes, sir.

Q. 2. You said something to the effect that the section foreman gives orders to the men on the man-trip. Now, you have mentioned about orders with respect to safety appliances of one kind and another, but what I want to ask you about now is with respect to work. The section boss doesn't give the men any orders to do work on the man-trip itself, that is, to do work to be performed on the man-trip, does he?

A. He gives orders about work after you get off the man-trip, about where you are going to work. If he has anything in particular that he wants done, he will tell you on the man-trip. He has me.

Q. 3. That's for work for them to do when they get to the place where they are going to work?

A. Yes, sir, and he will tell you while you are going in on the man-trip that he wants done up in that place.

Q. 4. You don't mean, I take it, that while the men of his section are going in on the man-trip, that he goes to each one of them and tell each one of them what he wants him to do?

A. No, sir. If he is sitting in the car beside you, and he has something he wants you to do, he will tell you.

Q. 5. If he sees you and thinks about something he wants you to do, he will tell you?

A. Yes, sir.

Q. 6. If he sees you outside and thinks of something he wants you to do, he will tell you then, too, won't he?

A. Yes, sir.

Q. 7. Most men on any particular work don't need any orders from the foreman, do they; they know what they ought to do and go ahead and do it?

[fol. 644] A. Yes, sir.

Q. 8. At the end of the day's work, you say you leave your tools where you think it will be most convenient to use them the next day?

A. Yes, sir.

Q. 9. In other words, if you are working on a particular job and know you are still going to be working there the next day, you leave your tools right there?

A. Yes, sir.

Witness stands aside.

ROBERT BUCHANAN, another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Senator Muse:

Q. 1. You are Mr. Robert Buchanan?

A. Yes, sir.

Q. 2. I believe you are a track man at No. 2 Mine?

A. Yes, sir.

Q. 3. You know Mr. James Wood, of course?

A. Yes, sir.

Q. 4. Did you hear the track men testified who were track men over at No. 1 Mine?

A. Yes, sir.

Q. 5. You have the same tools as all these other track men?

A. Yes, sir.

Q. 6. Perform the same duties?

[fol. 645] A. Yes, sir, practically the same thing.

Q. 7. What section do you work in?

A. First Right off of Peake's Branch.

Q. 8. You get on the man-trip like they do?

A. Yes, sir.

Q. 9. Does your section foreman give instructions as to the day's work while on that man-trip, on occasions?

A. Occasionally, if there is anything tore up the night before that I have not heard about, he will tell me.

Q. 10. Do you know of anybody who has been hurt on a man-trip that hasn't been mentioned here?

A. No, sir.

Q. 11. You can't add anything to it?

A. No, sir.

Q. 12. Is the roof the way you go any different from the roof the way Mr. Wood goes?

A. I have never been on the section he is on, but the way he described it, it is practically the same.

Q. 13. About the same as your roof?

A. Yes, sir.

No cross-examination.

Witness stands aside.

Roy Addison, another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Senator Muse:

[fol. 646] Q. 1. You are Mr. Roy Addison?

A. Yes, sir.

Q. 2. I believe you are a motorman at No. 2 Mine?

A. Yes, sir.

Q. 3. You have been a motorman for how long?

A. Around five years, pretty close to that, over at No. 2 Mine.

Q. 4. You get your lamp the same way the other men have described?

A. Some times my buddy takes my check and gets my lamp. He rides a different car.

Q. 5. You heard the motormen at No. 1 Mine testify?

A. Yes, sir.

Q. 6. Did you hear them describe what their duties were and how they performed them?

A. Yes, sir.

Q. 7. Do you do substantially the same thing at No. 2?

A. We have Cardox at No. 2 that we have to load and unload.

Q. 8. Do you get your motor out on the yard like they do at No. 1?

A. Yes, sir.

Q. 9. Do you sand it and oil it?

A. Yes, sir.

Q. 10. The same as they did?

A. Yes, sir.

Q. 11. Do you go into the mine on clearance orders?

A. Yes, sir.

[fol. 647] Q. 12. From whom?

A. From the dispatcher or the mine foreman. They are both out there generally all the time.

Q. 13. Tell how you perform your duties to any extent different from No. 1?

A. Getting Cardox is all. We have a big wooden box——

Q. 14. Where do you get it?

A. In the Cardox House; They have a rack.

Q. 15. Is that outside or inside the mine?

A. Outside, yes, sir.

Q. 16. What would you do with the Cardox?

A. There is two motors on the run we are on. They split up. We take our part and put them in the back of the motor. They are different from the motors at No. 1 and what Cardox I would need, we would carry around and put in the deck of the motor, so we can carry them up on the section.

Q. 17. Do you take Cardox to each man?

A. Yes, sir.

Q. 18. Within a few feet of each coal loader?

A. Yes, sir.

Q. 19. Would you pull a man-trip in?

A. Yes, sir, most of the time I would be pulling it; if not, I would be tailing.

Q. 20. What time did you go in the mine in the morning?

A. It would vary; some times, I would be down the track a little from the other motors. It would run from seven-ten to seven-thirty. They try to get the last man-trip in by twenty-five to eight.

Q. 21. Where would you be at eight o'clock?

[fol. 648] A. I wouldn't go on my section. The other motor would take the men up on the section and I would get empties on the outside and follow him in.

Q. 22. Where would you be at eight o'clock?

A. I would be near to my section. Some times I wouldn't and some times I would be there.

Q. 23. With cars?

A. Yes, sir. Some times I would have cross collars to take in. They always set cross collars and cap pieces in on the night shift.

Q. 24. You performed your duties about like the other men testified?

A. Yes, sir.

Q. 25. And came out with the man-trip?

A. Yes, sir.

Q. 26. What time did you quit work?

A. We quit work, some times we would be a little late, they wouldn't let us leave a car on a section and we tried to clear them up, and by picking up the men, it come to around three-thirty.

Q. 27. Were you allowed certain pay for the man-trip?

A. Yes, sir, they give us an hour.

Q. 28. One hour a day?

A. Yes, sir.

Q. 29. How long would it take?

A. It would take more than that hour. That was an advance section when I went over there in April and we had to load a lot of Cardox. I have loaded forty-eight, is the most I ever loaded.

[fol. 649] Q. 30. On an average, how much time would you spend in your duties in hauling the man trip in and out, for which they allowed you an hour?

A. It would take practically eight hours and a half or a little better, to do that, by handling the Cardox and everything. We have to bring the empty Cardox out that evening. You couldn't haul them in your motor, they wouldn't allow you to do that.

Q. 31. Am I correct that they allowed you an hour for your duties in hauling the man-trip in and out, but that it took you longer than an hour to haul the man-trip?

A. Yes, sir, they had an agreement on that.

Q. 32. How long would it take you to get it in and out?

A. I don't know exactly. We have timed it, it would take thirty to thirty-five minutes to pull the man trip, if you got out first. If you was behind the other motors, it would take you longer than that.

Q. 33. You mean each way?

A. Yes, sir.

Q. 34. Do you know of anybody getting hurt over there in that mine?

A. My buddy got his back broke.

Q. 35. When was that?

A. Between the last of April and the first of May. It seems to me like—I went to the hospital to see him, and he said he drawed some time for up in May, I don't know.

Q. 36. What was his name?

A. Curtis Shelton.

[fol. 650] Q. 37. Roy, I may not have gotten it plain. Where did this accident occur?

A. It was Two East.

Q. 38. Was that on the main haulage?

A. Yes, sir. It was maybe a week that this rock had been reported and they hadn't took it down, and we forgot about it, and we placed an empty up in the place and went back to get another empty, and take a load out, and my buddy whistled at me and I didn't hear him and I waited a while, and while I was waiting for him to tell me to go ahead, that rock fell on him.

Q. 39. Did you see it fall?

A. No, sir, there was a curtain between us, this brattice cloth.

Q. 40. Did you go up and see him?

A. I helped get him out from under there. The rock fell across the car.

Q. 41. Where did the rock fall from?

A. It fell from the roof.

Q. 42. Had it been marked bad?

A. Yes, sir, been reported to the foreman.

Q. 43. I am not certain whether that was on the main haulage or not?

A. It was a switch-off Parallel East heading, it was No. 2 heading, just one stump left in there.

Q. 44. A switch going off the main haulage way?

A. Yes, sir, right off the main line east.

Q. 45. Has he gone back to work?

A. He is in a wheel chair. He will never work any more, [fol. 651] the doctors say. He lives down below Richlands.

Q. 46. In the places where you run, what's the height of the roof, generally?

A. In sections where I run, I seen one of the coal loaders

measure the other day, and he said it was fifty-two inches but it varies, some of them are lower down.

Q. 47. How do you sit on the motor?

A. I sit sort of like I am in this chair only I keep this leg up under me.

Q. 48. Do you sit up straight?

A. I do in places, some I have to bend over.

Q. 49. What's the lowest bending over you have to do?

A. About like that. I keep my arm on the bumper of the motor.

Q. 50. Does the coal ever scrape when you pull the cars out?

A. Lots of cross collars will hang you up. The hill I am on is very steep and I have to split the load and if the coal loaders load big, I have to back up and scrape it off.

Q. 51. Do you get a shovel and scrape them off?

A. No, it will pull it off. If you have enough sand. You have to have two or three good tries at it, though.

Q. 52. If you have enough sand and power, you can pull it off?

A. Yes, sir.

Q. 53. That, of course, scatters coal over the walk way and track inside?

A. Yes, sir.

[fol. 652] Cross-examination.

By Mr. Stuart:

Q. 1. You say you are a motorman in No. 2 Mine?

A. That's right.

Q. 2. On one of the gathering motors?

A. Yes, sir.

Q. You spoke of the method of handling the Cardox and said that at this time you were, the arrangement was such and such, but since then, it had been changed. What do you mean by "this time"?

A. Now they send the Cardox over, they have got a man that don't do nothing but that, take them to each section and put them in a little box, and when we pass there, we have to load them up again on the motor, we don't put them in the box, and each loader gets his Cardox out of there and brings the empties back at night.

Q. 4. I am trying to find out when it was that this change was made?

A. They made it in the last three months, I would say, or four, something like that. I wouldn't say the exact time.

Q. 5. Up to some distance back, some three or four months, or some time you are not sure about, you took the Cardox in?

A. Yes, sir.

Q. 6. How did you take it?

A. We put it in the car next to the motor in a box,—the box wouldn't hold them all and we would have to put them in the car around the box.

Q. 7. That was not when you were taking a man-trip in? [fol. 653] A. Yes, sir, they used it for a tool-car, too, and the Cardox.

Q. 8. Back at that time, whenever it was, you say you were allowed an hour's time for bringing the man-trip in and taking it out?

A. Yes, sir.

Q. 9. And you say it took you thirty to thirty-five minutes each way?

A. Yes, sir, it would. Some times it would take more and some times it wouldn't take that long. We would come outside and the boss would hold us up some making up his report. We had two reports at that time, that he had to turn in, how many Cardox he sold, and how many good ones left, and we would bring our Cardox chips in that we collected that day for the Cardox.

Q. 10. You spoke of an accident when your brakeman had a piece of slate fall on him. That was not on a man-trip, was it?

A. No, sir.

Q. 11. You were spotting a car at that place, I believe?

A. We was bringing a car out of the place and he halloed at me, and I didn't understand what he said, and while I was stopped, that rock fell on him, and by the time I got back to him, the coal loader was holding his hand up out of the water. He was in a water-hole.

Witness stands aside.

[fol. 654] FORREST RITCHIE, another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Col. Harris:

Q. 1. Mr. Ritchie, are you an officer of one of the Local Unions?

A. Yes, sir, I am recording secretary.

Q. 2. Of which one?

A. Seventy-three thirty-two.

Q. 3. Over at one of the mines of the Jewell Ridge Coal Corporation?

A. Yes, sir.

Q. 4. How long have you been working for the Jewell Ridge Coal Corporation?

A. October 12th, 1936.

Q. 5. What work have you been doing between April 1st, 1943, and the present time?

A. I was a coal dumper.

Q. 6. What's that?

A. That's the man that dumps the coal as it comes out of the mine.

Q. 7. Are you an inside or an outside man?

A. I am classed as an outside man.

Q. 8. How many coal dumpers would there be working on your shift?

A. One.

Q. 9. And that would be you?

[fol. 655] A. Yes, sir.

Q. 10. Was all the coal that was hauled out of that mine during the shift you were working coal that passed under your supervision?

A. Yes, sir.

Q. 11. Did you have occasion during this period from April 1st, 1943, to the present time to notice the condition of the coal that came out of the mine?

A. Yes, sir.

Q. 12. With reference to rock or slate falling on top of the coal cars?

A. I did.

Q. 13. Describe to the court what you found on these coal cars as they came up and were ready to be dumped into the gondolas?

A. Well, some times the car will have a small rock on it, maybe weigh fifty pounds, seventy-five pounds, *seventy-five pounds*, and my buddy, the check-puller, rolls those rocks off himself, and if there is any that he can't handle by himself, I have to go back and help him roll them off the cars.

Q. 14. Is that often?

A. I have known him some days to have one or two; some days he is busy practically all day taking rocks off the cars.

Q. 15. Where would the rock come from, in your judgment?

A. To my opinion, they come from the top.

Q. 16. Would you notice any difference in the cars with rock on top of the coal on one day more than any other day?

A. It seemed on Monday there was more rock than any other time.

[fol. 636] Q. 17. They didn't operate the mines on Sunday?

A. No, sir.

Q. 18. Then on Monday how many cars would you find, roughly speaking, during the day that slate had fallen from the roof on those cars and was still on the cars when they got up to be dumped?

A. It would vary from time to time. Some times there would be six or eight cars in the run of a shift and I have known it when, as I say, we would be practically busy,—I have known it to be as many as twenty.

Q. 19. In your shift?

A. Yes, sir.

Q. 20. Would you see any indication in the way in which the coal was placed in the cars which lead you to believe that the coal had scraped against the roof or top or cross collar on the way out of the mine?

A. That was frequent.

Q. 21. Was that as frequent as having rocks fall from the roof?

A. You would see more of that than you would rock.

Q. 22. More indication of it having scraped against the roof?

A. Yes, sir.

By the Court:

Q. 23. How could you tell?

A. It would be smooth, like you would take something and planed it up real smooth and the coal would be ground up real fine right on top.

[fol. 657] Q. 24. That's what you base your judgment on?

A. Yes, sir.

By Col. Harris:

Q. 25. A cross-collar is a timber that goes from one post to another?

A. Yes, sir.

Q. 26. Take a car load of coal that comes out of the mine that hasn't hit anything, how is the top of that car in appearance?

A. It has little holes all over the top where the coal loaders throws his coal in, throws a lump in, and it will be rough on top.

Q. 27. And the cars you thought had been scraped against the cross-collars or roof had been smoothed off as if something had been dragged across them?

A. Yes, sir.

By Mr. Richardson: We move to strike out the testimony of this witness because it is immaterial and irrelevant and based entirely upon inferences and conclusions which he would draw, and not as to facts which he knows himself.

By the Court: I think that goes to the weight of the testimony. Frankly, I think it is rather remote, I can see nothing material about it, except rather remotely going into the hazard of the man-trip. For such weight, as I deem it worthy of, I will overrule the motion and leave it in.

By Mr. Stuart: With our usual reservations about cross-examination as to evidence regarding hazards, we will cross-examine:

Cross-examination.

By Mr. Stuart:

[fol. 658] Q. 1. Mr. Ritchie, do you see the man-trips come out in the evening?

A. Yes, sir.

Q. 2. How many rocks do you see on them when the trip comes out?

A. What the men rides on.

Q. 3. The same ones they put in there to sit on are the ones you see?

A. Yes.

By the Court:

Q. 4. I thought they put planks in. The rocks don't make the mourner's bench sit any easier, does it?

A. If the car is wet, it would be some help.

Witness stands aside.

HARRISON KEEN, another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Senator Muse:

Q. 1. You are Mr. Harrison Keen?

A. Yes, sir.

Q. 2. I believe you are a bond man?

A. That's right.

Q. 3. The first one of your description that's testified in this case, aren't you?

A. Yes, sir.

Q. 4. You work in both Mine No. 1 and Mine No. 2?

[fol. 659] A. Both mines.

Q. 5. So we may understand, suppose you tell us what does a bond man do?

A. He welds bonds on joints in the track.

Q. 6. Is that these little copper connecting pieces that you see on street car tracks occasionally?

A. I imagine they are the same thing.

Q. 7. That connects two rails together?

A. Yes, sir.

Q. 8. That's what you do on the tracks in the mines?

A. Yes, sir.

Q. 9. Are you the only bond man employed by this coal company?

A. Yes, sir. I have a helper.

Q. 10. But you are the only one in charge of the bond work?

A. Yes, sir.

Q. 11. What time do you get your lamp?

A. About six-thirty of a morning.

Q. 12. Do you get it the same way everybody else gets theirs?

A. Yes, sir.

Q. 13. In your work, what tools and equipment do you use?

A. The tools we use is nothing but a regular mining pick with a wedge on one end, sharpened like a wedge, and the other is just a point.

Q. 14. What kind of material do you use?

A. Use bonds and welding steel.

Q. 15. And what is the bond, what is it made of?

[fol. 660] A. It is copper with steel on each end of it.

Q. 16. How is that fastened to the rail?

A. Welded on with an electric welder.

Q. 17. Do you take some of these bonds with you every day?

A. Yes, sir, nearly every day.

Q. 18. How many do you take?

A. If we are checking the main line track to replace a broken rail or something, we usually check out ten or fifteen bonds.

Q. 19. How much do they weigh?

A. Ten or fifteen pounds.

Q. 20. How many, generally, do you take in?

A. On an average, twenty-five.

Q. 21. They would weigh how much?

A. Around fifty to seventy pounds, I guess, altogether.

Q. 22. Where are they gotten?

A. At the supply house.

Q. 23. Do you have to have an order to get them?

A. Yes, sir.

Q. 24. Who do you get them from? The order, I mean.

A. From the shop foreman at the machine shop.

Q. 25. Do you take in any welding steel with you?

A. If we take ten bonds, we take three or four pounds of welding steel.

Q. 26. The amount of welding steel you take depends upon the number of bonds?

A. Yes, sir.

Q. 27. Do you take some in every day?

[fol. 661] A. Yes, sir.

Q. 28. How about a welding shield, do you have one?

A. Yes, sir.

Q. 29. Do you take that in every day?

A. Yes, sir. I say every day, some times we leave it on the section.

Q. 30. Generally, how often do you bring it in?

A. Three or four times a week.

Q. 31. Where do you leave it in the evening when you bring it out?

A. In the machine shop.

Q. 32. This welding machine, how much does it weigh?

A. I imagine about eight pounds. I handle it a lot.

Q. 33. After your work, if you haven't finished, do you leave it there over night?

A. Yes, sir.

Q. 34. How often during the week do you bring that machine out?

A. Maybe three or four times. If we are going to change sections, we generally always bring it out to go to another section the next day.

Q. 35. I am trying to strike an average?

A. I would say four times, average.

Q. 36. Do you bring your pick out every day?

A. Generally. It has to be sharpened.

Q. 37. The blacksmith sharpens that like he does the others?

A. That's right.

Q. 38. How do you get those bonds, welding machine, [fol. 662] tools and supplies in where you are going to use them?

A. We check the bonds out at the lamp house in the morning and the steel, and carry them to the portal where we catch the trip and load them up in the tool car.

Q. 39. What about the welding machine?

A. We generally leave it setting out at the portal and set it up in the trip.

Q. 40. You mean put it in the car?

A. Yes, sir.

Q. 41. In the tool car?

A. Yes, sir.

Q. 42. How about the bonds and the welding steel?

A. Yes, we put them in the car, too.

Q. 43. The equipment and stuff you carry in, you put in the tool car?

A. All except the welding machine.

Q. 44. Suppose you are going to work at parallel section, how do you get there?

A. Catch a man-trip.

Q. 45. The same way the coal loaders get to parallel, if they work in that section?

A. That's right.

Q. 46. At what point would you take off your supplies and tools?

A. If we was going to a section, we take it off at the man-station where the other men gets off at.

Q. 47. Suppose you were working five hundred feet away from a man-station, or any other distance, how do you get [fol. 663] your supplies and tools up to where you were actually going to use them?

A. We pull them with the machine.

Q. 48. Is the machine fixed so it will stay on the track?

A. No, sir.

Q. 49. How do you pull it?

A. On runners like a sleigh.

Q. 50. How do you pull it?

A. Use a cable and tie the machine and drag it along.

Q. 51. Who does the pulling?

A. That's the helper and myself both.

Q. 52. You hitch up and go to pulling?

A. We don't pull at the same time.

Q. 53. Moving from the man station to where you are going to use it is a problem for you and the helper?

A. Yes, sir.

Q. 54. One man pulls until he gets tired and then the other man takes up?

A. Yes, sir.

Q. 55. What time do you leave the man station, usually?

A. Not until eight o'clock.

Q. 56. So going from the man station to where you are actually working is after your pay begins at eight o'clock?

A. Eight o'clock is when my pay begins.

Q. 57. Am I correct that your pay does begin at eight o'clock?

A. Yes, sir.

Q. 58. And ends when?

[fol. 664] A. Three-thirty.

Q. 59. You take thirty minutes off for lunch?

A. Yes, sir.

Q. 60. You eat lunch about like the rest of the men?

A. That's right.

Q. 61. What time do you quit performing actual work with that machine?

A. Three-thirty, generally.

Q. 62. Suppose you are going to work in that section the next day, where do you leave the machine?

A. Leave it on the section.

Q. 63. At the exact point?

A. Yes, sir, right where we quit off.

Q. 64. And you move from section to section over both mines?

A. Yes, sir.

Q. 65. After you finish one section, do I understand you take these tools and equipment back out of the mine and go to another section then?

A. Yes, sir.

Q. 66. Going back out, you go in reverse order to that in which you came in?

A. That's right.

Q. 67. How many hours a day are you in the mine?

A. We generally leave about seven and get back about four-thirty or five o'clock.

Q. 68. For how many hours are you paid?

A. Seven hours.

[fol. 665] Q. 69. From eight to three-thirty less thirty minutes for lunch?

A. That's right.

Q. 70. Is that true in No. 2 Mine also?

A. Yes, sir.

Q. 71. Is there much difference in the type of work you do at No. 2 Mine and the type you do in No. 1 Mine?

A. The same thing.

By the Court:

Q. 72. Do I understand that every rail is bonded?

A. Every rail under the trolley wire except the thirty pound steel. We just use one rail for return but on the main haulage we use two bonds to every joint on each rail.

Cross-examination.

By Mr. Stuart:

Q. 1. Mr. Keen, you work a seven hour day, you say?

A. Yes, sir.

Q. 2. And your time starts at eight o'clock and ends at three-thirty, with half an hour out for lunch?

A. Yes, sir.

Q. 3. And you are supposed to be at the point where you are going to start work at eight o'clock in the morning?

A. Supposed to be on the section, in the mine where I start my work at, when my pay starts.

Q. 4. How do you get to the place where you are going to work?

A. Ride a man-trip.

Q. 5. I believe you said you work all over both mines?

[fol. 666] A. That's right.

Q. 6. Part of the time you are not even inside the mine, are you?

A. Some days I don't go in. I work some times between the mountains on the outside.

Q. 7. And you have some tracks outside the portal that you have to check?

A. Yes, I work from the tipple all the way inside as far as the trolley line goes.

Q. 8. Some days you are working just inside the portal, are you?

A. That's right.

Q. 9. So you may be working at the fartherest distance away from the portal or you may be working at the closest place to the portal on a particular day?

A. That's right.

Q. 10. When you state that you go inside about seven o'clock and don't get back until four-thirty or five, you are talking about those days when the place where you are going to work is the fartherest distance away from the portal, aren't you?

A. Riding the man-trips.

Q. 11. When you are working at some place close to the portal, of course those hours you gave wouldn't apply?

A. I generally check the main line track about every thirty days unless there is some tear-up and I have to check it right then.

Q. 12. This welding doesn't last forever, you say you [fol. 667] have to check it ever so often?

A. Yes, sir.

Q. 13. You say you check the main line about how often?

A. About every thirty days.

Q. 14. On the sections, you don't check that often, I suppose?

A. No.

Q. 15. I suppose the reason why this welding has to be done is in order to provide a circuit for the electric current?

A. That's right, get your return.

Re-direct examination.

By Senator Muse:

Q. 1. On an average, how much time will you spend in the mine as distinguished from the time you spend outside?

A. Well, I wouldn't have an outside day's work maybe once in two months, unless there is some new tracks being laid outside.

Q. 2. The rest of the time you spend some where in the mines?

A. Yes, sir.

Q. 3. When you work in the mines, do you ride the man-trip?

A. Yes, sir.

Q. 4. If you do ride the man-trip, you get out about the same time, regardless of how far in you are working?

A. Yes, sir.

Q. 5. Is that true because the man-trip gets the men anywhere in the mine?

[fol. 668] A. Yes, sir.

Re-cross examination.

By Mr. Stuart:

Q. 1. You say you don't work outside the mines more than once in two months. You mean when you have got a buddy, don't you?

A. I have a buddy always.

Q. 2. Don't you work in the shop some times without a buddy?

A. I work in the shop some. While we are off, I work in the shop and help repair cars.

Q. 3. You do that a good deal, don't you?

A. Yes, some times when my buddy is inside, I work out there. It's according to how rush the work is.

Witness stands aside.

OFFER IN EVIDENCE

By Col. Harris: If the Court please, the defendants want to introduce certain rules from a book on the back of which is printed:

"Jewell Ridge Coal Corporation

Special Rules

For the Safety and Operation of Mines

Adopted in Conformity with the Mining Laws of the State of Virginia (Sec. 1887-1)

Take Home and Study

October 1, 1940
Revised October 1, 1941."

[fol. 669] By the Court: Is there objection, gentlemen?

By Mr. Richardson: No, sir, we don't object unless there is some question of the relevancy. I don't know just what he wishes to introduce.

By the Court: In as much as the defendants desire to put certain rules in, will the plaintiff desire to put any in? My thought was if you do, let it be stipulated that the whole book go in, with each side introducing such rules as they desire to call particular attention to.

By Mr. Richardson: That's all right, sir.

By Col: Harris: Yes, sir.

The defendants, by counsel, thereupon offered in evidence certain rules from the book above referred to, and read the same to the Court, said rules being in the words and figures following:

"6. Do not practice any tricks, horseplay, wrestling, or throw any material whatsoever while in or about the mines.

"8. Do not ride on any trip except the man trip.

"9. Jumping on or off moving cars or motors is strictly forbidden.

"16. All employees, upon entering the mine, shall go directly to their working places (do not take short cuts over dangerous places); and no person shall be permitted to loiter in or about the mines, buildings, or machinery at any time. Loitering or sleeping around the sand house or sand drier is positively forbidden.

"20. Each employee, before entering the mine, shall deposit his check on a board provided for that purpose, or deposit check with lamphouse man. On leaving the mine each man must remove his check from the check boards. Failure to check in and out will be cause for discipline.

[fol. 670] "29. All man trips shall be handled with caution, and every foreman in the man trip shall be responsible for the safety of the men and see that all rules covering these trips are complied with.

"30. All man trips shall come to a full stop, and a signal shall be given by the official in charge of the man trip, before any one gets on or off.

"32. All men shall ride on the off side from trolley wire, and cars shall not be over-crowded.

"33. The speed of the man trip shall not exceed 6 miles per hour, and motormen shall keep trip in control at all times in order that he may stop trip within the length of itself.

"34. No man trip other than the regular man trip shall run except on orders from the Mine Foreman.

"35. Wrestling, throwing materials, or horse-play of any kind is positively prohibited on any man trip.

"36. One car in each trip will be designated as a tool car and all tools must be deposited in this car; no one shall be permitted to ride in this car.

"Penalty for failure to observe any of the above rules shall be:

1st offense—warning.
2nd offense—2 days lay off.
3rd offense—5 days lay off, or discharge.

"41. Each miner shall go directly to his working place, and on entering his working place he shall examine it carefully, take down all loose and dangerous roof rock with a slate bar or wedge, or make it safe by timbering, and otherwise make his place safe before proceeding with his work.

[fol. 671] "48. Never carry tools or other materials on your shoulder; they may come in contact with electric wires or loose pieces of roof and result in personal injury.

"53. Listen for motor and be in the clear when cars are placed at your working face. Do not stand or sit near a switch or curve when motor or cars are passing.

"81. Before beginning work on the track, trackmen shall examine the condition of the roof at the place where the work is to be done and make the same secure either by timbering or pulling down any loose slate that might be found.

"91. Do not work under exposed or bare power lines unless absolutely necessary.

"93. Do not leave a job until it is cleaned up or some arrangement made to have it cleaned up. Timbers must be set so as to give standard clearance on entries of not less than fifty-two inches and in rooms not less than forty-two inches on the clearance side.

"96. Examine and oil your motor before starting to use it, and see that all parts visible are in good condition. If motor is not in good condition, notify the Shop Foreman or Mine Foreman before taking it into the mine.

"113. An interval of at least five hundred feet shall be maintained between locomotives traveling in the same direction.

"118. Motormen at the end of the shift are instructed to take their motors to the motor barn and not to leave their motors until they can get to the barn; and there report any needed repairs to their motor. The practice of leaving motors in driftmouth, at sandhouse, or on main line, is positively prohibited.

[fol. 672] "148. From time to time during progress of the cut, the machine runner and helper must examine the working place to see that it is not becoming unsafe. If a dangerous condition arises, the machine man may add or set

additional timbers for his safety. If it is necessary to change or remove a timber while cutting, other timbers to take their place must be set under the supervision of a Foreman. Under no circumstances shall a machine crew continue to cut a place knowing that an unsafe condition has arisen. If it is a condition that cannot be corrected, remove the machine, if it is safe to do so, to a safe place and notify the Mine Foreman.

"163. It is the Foreman's and Assistant Foreman's first and unceasing duty to watch carefully and require employes under their supervision to strictly observe the Mining Laws of the State of Virginia and the Rules promulgated by the Jewell Ridge Coal Corporation for the purpose of avoiding injuries to employees. Any infraction of the law or of these Rules which you yourselves cannot remove must, without delay, be reported to the Superintendent. You must require strict obedience to your orders and enforce rigid discipline.

"171. Examine the place where the men leave their buckets, extra clothing, do their shooting, etc., and designate a safe place for the workmen to eat their lunches, and spend their spare time."

By Col. Harris: If we think of any others, we will call attention to them.

The rule book referred to was thereupon filed, marked as: [fol. 673] "Defendants' Exhibit I," and is returned as a part of this transcript.

By Col. Harris: We think that concludes our evidence, if the Court please.

By Mr. Richardson: If Your Honor please, we haven't our rebuttal witnesses here. We thought it would take all of the day for the defendants to conclude their testimony and expected to be in position to go ahead in the morning.

By the Court: I can appreciate that situation, and will look after you on it. I have to stop early today; I have two more cases to dispose of this afternoon. I take it you have no rebuttal you are ready to start with if the defendants now rest?

By Mr. Richardson: I am not sure. We might want something from Dr. St. Clair.

By the Court: We will take a recess now until twenty-five minutes to four.

Following the recess.

The Defendants here rested.

By Mr. Richardson: We would suggest, if it pleases Your Honor, to adjourn until tomorrow morning, at which time we will have such rebuttal witnesses as we require and we will have it so arranged that we can go through it very quickly.

By the Court: How quickly? What is your estimate of time?

By Mr. Richardson: Two or three hours.

And thereupon, at this time, Court adjourned until tomorrow, Wednesday, November 24th, 1943, at 9:30 A. M., at which time the trial of this case was resumed.

[fol. 674] And, Thereupon, the plaintiff, to further maintain the issues on its behalf, introduced the following evidence in Rebuttal, to-wit:

W. J. Elgin, a witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct-examination.

By Mr. Richardson:

Q. 1. Your name is W. J. Elgin?

A. Yes.

Q. 2. You are a Mine Inspector for the Virginia Department of Mines, are you not?

A. Yes.

Q. 3. Where do you live?

A. Richlands, Tazewell County.

Q. 4. How long have you been a State Mine Inspector?

A. Since April, 1935.

Q. 5. Throughout that time, have you been familiar with the mining operations of the Jewell Ridge Coal Corporation?

A. I have.

Q. 6. Have you yourself examined the mines of this corporation?

A. I have.

Q. 7. About how frequently have you been in these mines?

A. I make them every ninety days or four times a year.

Q. 8. When you visit the mines to make an inspection, approximately how much time do you spend?

[fol. 675] A. Well, it depends on the size of the mine. These mines usually takes me ten to twelve days, the No. 1 Mine, and about the same at No. 2.

Q. 9. And that gives you an opportunity, does it, to go all through the mine?

A. That's my practice, to visit every working place.

Q. 10. And you have followed that practice?

A. I have.

Q. 11. I wish you would state, Mr. Elgin, whether in this Jewell Ridge Mine, you have observed evidences of supervision and care in the maintenance of the man-trip haulways?

A. Yes, I have observed—I make this examination of the haulways as well as the working places in my travels through the mines.

Q. 12. What has been your observation as to the attention given to the overhanging rock and other obstructions that might be there, constituting hazards in the haulway?

A. Well, at times I have found conditions of top that needed attention and called the foreman or safety man, who so happens to be with me, about that and it is passed on to those who have the job of removing that hazard.

Q. 13. Is it given prompt attention?

A. So far as I know, yes, it has been, and one or two times, a few times, I have made return trips to see that it was carried out.

Q. 14. And what have you found?

A. Usually it has been carried out pretty promptly.

Q. 15. What would you say as to the general condition [fol. 676] of the haulways, the man-trip haulways throughout these mines, for safety, as compared with the general standards which your Department upholds?

A. I think that those haulage roads of the Jewell Ridge Mine are really, I would say, as good, if not better, than the average of the Virginia mines, because, although they have bad top conditions some places, others the top conditions are exceptionally good, and the haulage roads are not hard to maintain. The normal hazards in the mine exists there

as they do in all mines, and that's something that has to be taken care of daily.

Q. 16. At places where there are bad top conditions, have you or not found evidence of proper attention given to those conditions for the safety of persons passing there?

A. As a rule, efforts to take care of those has been observed.

Q. 17. And those efforts are a practical and proper provision for the safety of the people?

A. Yes, I think they are.

Q. 18. What would you say as to the general sanitary or healthful condition of these mines?

A. I have never, I don't think, found a condition where you might say, on the traveling roads, where you would consider anything obnoxious. I have traveled lots of times through old work, which is one of my jobs, to make examinations of old works, and found where the men have used it for a toilet, but it is not in the usually traveled road. Occasionally, you will find where some man has gone ahead and [fol. 677] used a place that he shouldn't have on account of it being in proximity to the work, but he knows better than to do that. He knows he can go into places where it wouldn't get,—be obnoxious.

Q. 19. They are supposed to use the abandoned workings, are they not?

A. That's what they are urged to do.

Q. 20. No mines provide toilets or sanitary facilities other than what you find here, do they?

A. No, not any where near the working place. Some mines have such places, like shaft mines that I have seen them provided where they have running water; but not at the working places.

Cross-examination.

By Senator Muse:

Q. 1. Now, Mr. Elgin, when you make your inspection trips you make your report, I take it, of the inspection you have made?

A. Yes.

Q. 2. And call attention to the mine foreman and mine people at Jewell Ridge, in this case, as to conditions that you have found that needed correction?

A. Yes.

Q. 3. And you always find some condition that needs correction, I take it?

A. Absolutely, because you might pass through today and not find it and tomorrow you will find it. Those things are changing from day to day.

Q. 4. You have been going to Jewell Ridge since 1935, I believe?

[fol. 678] A. Yes.

Q. 5. I mean the two mines?

A. Yes.

Q. 6. And in the eight years you have been going to those mines, there hasn't been a single trip that you can now recall where you did not have some suggestions to make?

A. That's right.

Q. 7. And they dealt usually with matters of safety?

A. Yes, that's one of my main jobs, is to try to promote safety in the mines.

Q. 8. That's the prime purpose of your making the inspections?

A. Yes, sir, from two standpoints, the benefit of the operator and the men.

Q. 9. I am sure of that. And you make an inspection four times a year?

A. Yes.

Q. 10. So in the eight years, you have made approximately thirty-two inspections?

A. Yes, and two this year, which make it thirty-four.

Q. 11. And in the thirty-four inspections you have made in the last eight years, there has not been a single inspection trip in which you did not have recommendations to make as to safety?

A. That's right, sir.

Q. 12. Wouldn't those same conditions that you referred to in each of your reports be as apparent to a competent foreman in those mines as they would be to you? They could see it as well as you could, couldn't they?

[fol. 679] A. Yes, they could, and at the same time, a stranger going into the mines that didn't see those things every day, he is apt to observe things some times that a man that is accustomed to looking at things will pass over.

Q. 13. Is it the old principle of "Familiarity breeds contempt"?

A. That's it.

Q. 14. But if he were as careful as you are, the conditions that you report would be just as obvious to him as to you?

A. If he went through with the idea of making a safety inspection, they would.

Q. 15. Well, they have section bosses in each section,—I have heard of a mine superintendent, of a mine foreman,—all those men in that mine could observe the conditions that you call their attention to, couldn't they, if they would just look?

A. If they just centered on that one thing, yes.

Q. 16. It's a pretty important thing to center on, isn't it?

A. Yes, that's one of the various duties of a section foreman.

Q. 17. One of his important duties?

A. One of his important duties, there's no doubt about that.

Q. 18. You say when you make recommendations about dangerous conditions, when you go back, you find it has been remedied?

A. Yes, but another develops.

Q. 19. You say you usually found they had been remedied?

A. Yes, sir.

[fol. 680] Q. 20. You meant, I take it, that some times they had not been remedied?

A. That's right.

Q. 21. You meant that some times when you called their attention to a dangerous condition in your report, you went back and it hadn't been remedied, and you had to call attention to it again, I take it?

A. In the particular case, probably, I can't say right off the reel as to whether I found,—probably in a few instances, but usually it is a similar condition in another section of the mine that has developed.

Q. 22. And these worked out places that you had reference to that you went through, the air circulates through those worked out places, does it not?

A. Yes, those worked out places, if the mine is properly ventilated, the air from them is carried away from the working places rather than towards it.

Q. 23. I believe you said as a rule they make efforts to take care of the bad conditions at the mine?

A. Yes.

Q. 24. "As a rule,"—that implies to me that some times they don't; is that correct?

A. Well, I—I would say that I have found very few cases where it wasn't eventually. It may not have been taken care of very promptly.

Q. 25. Of course, a bad condition might eventually take care of itself, mightn't it?

A. It might but some times those things, in the routine, [fol. 681] if the condition is such that it is of immediate danger, I usually, it has been my practice to call attention to it, and have it immediately remedied. Sometimes these conditions are something that will develop into a hazard and should be taken care of, and, of course, some times those things are left to the routine work before they are, but I recall times when I have gone through and I have even shut sections down because there have been places in them that there were conditions there that I felt was hazardous to the travel of the men as well as the motors and I had them closed until they could be corrected.

Q. 26. I think I understand that you have, on occasions, at those mines found conditions you considered dangerous, and had them close the section down until it was remedied?

A. Yes, sir.

Q. 27. And they did it, when you told them to close it, they closed the section down?

A. Yes.

Q. 28. And that condition that rendered it so dangerous that you felt it was your duty to close the section down, and they followed your direction, didn't they?

A. Yes.

Q. 29. And those same conditions could have been observed by them without your calling their attention to it, if they had been careful, couldn't they?

A. Some times it has been a question of how recently that danger has developed, because I know cases where we passed under and examined the top and it seemed perfectly safe and come back in half an hour and it would be down. [fol. 682] Q. 30. That's not generally true?

A. No, I don't know that you could say it was generally true.

Q. 31. Certainly that condition that was so dangerous that you closed the section down was as perfectly obvious to them as to you if they had looked at it, isn't that true?

A. That's true.

Q. 32. I believe it is true, is it not, Mr. Elgin, that by reason of the constant passage of cars through the—loaded cars and empty cars and the vibration of those cars through the haulways, that those haulways are always dangerous, aren't they, the danger of having a slate fall and thereby requiring constant attention?

A. They do require constant attention. Of course, the change of seasons and the passage of the air creates a sudden hazard in the top and the vibrations, of course, it has its part to play, and for that reason, what you don't find today, you may find tomorrow. You have to consider that.

Q. 33. By a combination of those circumstances you have just described, it makes the main haulage ways constantly dangerous?

A. Yes, and for that reason they are usually brushing, what they call brushing, or taking down thise loose stuff.

Q. 34. That's done almost daily, isn't it?

A. Yes, they take it down daily in the average mine, and daily there is probably some of it develops.

Q. 35. And that's one of the reasons, the principal reason, isn't it, why travel inside the mine is more dangerous than outside, isn't it?

[fol. 683] A. Well, I don't know whether you can say that or not, because the record of accidents outside and inside would control that more than what I could say.

Q. 36. Based on your experience at either mine at Jewell Ridge, will you not agree that it is certainly less dangerous for a man to be outside with just the sky overhead, or clouds, whatever is up there, than on the inside?

A. Oh, yes, that's true.

Redirect examination.

By Mr. Richardson:

Q. 1. Have you, in your experience with this company, found the management cooperative with you?

A. They have been very cooperative.

Q. 2. And have they taken such measures as you have from time to time suggested, looking to the improvement of safety conditions?

A. I have felt that way, yes.

Q. 3. You have referred to going into the mines repeatedly and coming out with recommendations or sugges-

tions for safety. Did you ever go into a mine anywhere at any time without finding something to recommend for its improvement?

A. No, indeed.

Q. 4. Do you ever expect to?

A. No, indeed. It isn't humanly possible to make it Utopian.

Q. 5. And a perfectly safe mine would be something you wouldn't expect to find?

A. No.

[fol. 684] Q. 6. You referred to a shut down of a portion of a mine. You haven't had any occasion any time recently to shut down any portion of either of these mines, have you?

A. No, I have not.

Q. 7. If you have done so at all, it's been a long time ago?

A. Yes, some few years back.

Witness stands aside.

H. R. Lovell, another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Stuart:

Q. 1. You are Mr. H. R. Lovell?

A. Yes, sir.

Q. 2. Where do you live?

A. Jewell Ridge.

Q. 3. I believe you are General Mine Foreman of Mine No. 1 of the Jewell Ridge Coal Corporation?

A. Yes, sir.

Q. 4. What has been the length of your experience in the coal mining business?

A. Twenty-two years.

Q. 5. How long have you held your present position?

A. Nine months with this company.

Q. 6. Now, I want to ask you about the situation around the portal at the beginning of the shift. Take the morning shift. About how long before the man-trips start do the [fol. 685] men begin to gather around the portal?

A. Well, they start coming in about six o'clock.

Q. 7. And what do they do after they get in there, in a very general way?

By Senator Muse: It seems to us that this is part of the evidence in chief for the plaintiff and that they went into it with Mr. Hagy. It doesn't seem to us to be in the nature of rebuttal evidence.

By the Court: It might be rebuttal. I will admit it.

Q. 8. Are you present in the mornings before the man-trip starts?

A. Yes, sir.

Q. 9. What time do you get there?

A. Six o'clock. I try to be at the Mine Office at six o'clock every morning.

Q. 10. You say the men begin to get to the portal at about six. Are they required to be there at six?

A. No, sir.

Q. 11. Do all of them get there at six?

A. No, sir. However, they come in in cars at different times and from different directions.

Q. 12. They just gradually gather in?

A. That's right.

Q. 13. Those who get there say an hour before the man-trip is going to start that they are going to take, what do they do in that intervening time, how do they occupy themselves?

A. They get their lights and a bunch of them will get together probably around a fire, stove some place, or quite [fol. 686] a few of them come in the Mine Office, and they stand around and talk and do quite a bit of smoking, and you hear them talking about their work quite a bit.

Q. 14. For the most part, they are just killing time, are they not?

A. That's right, killing time.

Q. 15. Are they under any supervision during that period?

A. No, sir.

Q. 16. There has been some evidence in this case about certain preparatory activities that some of the company men do before they go in—for instance, the motormen, as to what they do with the motors, and some of the other company men, about getting supplies. I want to ask you think, with respect to the total time that the average man will stand around there before the man-trip starts, how much

of that time is occupied with these preparatory things that some of the company men do?

A. I would say at the most not over ten minutes.

Q. 17. That's the outside of what any man will take?

A. Yes, sir.

Q. 18. What would you say about the average amount of time—you have said that ten minutes would be the outside?

A. Well, I would say anywhere from three to ten minutes, just to take it for an average all the way through.

Q. 19. There has been some evidence to the effect that some of the company men at times carry heavy supplies that they are going to use to the man-trips and put them in the tool-car. What can you say as to whether that is required or by choice in any particular man himself?

A. Well, that's by his own choice.

[fol. 687] Q. 20. What other way could these heavy supplies be routed for him at the place where he is going to use them?

A. We have a supply crew at night and we deliver the supplies on the section when they are ordered for that section.

Q. 21. Do some of the men who need these supplies give their order the day before?

A. Yes, sir.

Q. 22. Take the brattice man, for instance, who is going to need a bag of plaster the next day, has he the right to give the order the day before?

A. Yes, sir, he has the right to give the order to the section foreman and the section foreman writes the order up for him and signs it and gives it to him, and therefore, we turn the order over to the supply man at night, the supply crew, and he delivers the stuff.

Q. 23. Where is the stuff delivered under those circumstances with respect to where the man is going to need to use it?

A. Well, the supply man would probably just have a point somewhere on the section where he would place that.

Q. 24. Why is it some company men prefer to handle their own supplies and take them in with them on the man-trip rather than give the order the day before and let the supply crew take them in?

A. He can get this stuff about where he wants it and he would rather load it up out there than to go inside and have to go to the motorman and look to see if he had it.

Q. 25. You mean if he takes it with him, he can see that the gathering motor delivers it right to the spot?

A. Where he will need it, that's right.

[fol. 688] Q. 26. Whereas, if it is taken in the night before, it will be put at some convenient place on the section, but not necessarily right where he is going to use it?

A. That's right.

Q. 27. Going back a moment to those preparatory activities that you were testifying about a few minutes ago that you spoke of taking anywhere from three to ten minutes on the part of the men who do them—are those activities under supervision?

A. No, sir, he just volunteers and wants to do it that way himself.

Q. 28. Take the motorman who is getting his motor ready, is he supervised when he and the brakeman are doing that?

A. That's always been the custom.

Q. 29. You don't understand the question. I am asking you when he does that, when he goes and prepares his motor, is he under the supervision of a foreman at that time who is giving directions about how to do it?

A. Yes, sir, he does.

Q. 30. How is that?

A. The dispatcher will probably want the motor out in front and he will have to tell this fellow how he wants him to switch it and get out of there.

Q. 31. Tell him how to get his motor out?

A. Yes, sir.

Q. 32. What I am talking about is the preparation of the motor for use, the sanding and oiling.

A. Whatever they do to the motor itself, as far as sanding and oiling, he is not under any supervision then.

[fol. 689] Q. 33. If the motor is at a particular point where, in order to get it into the mine it has to pass various other motors and maybe cars, he will have some direction about where to switch?

A. That's right.

Q. 34. That's what you are talking about as to direction?

A. Yes, sir.

Q. 35. These incidental things which you have described as taking anywhere from three to ten minutes as they have been done in recent months, state to what extent those same things have always been done during your experience in the coal mining business?

A. Well, my experience has been it has always been the custom for those things to be done.

Q. 36. Now, Mr. Lovell, there has been some testimony with respect to the safety of the top in the haulways where the mine cars operate in the No. 1 Mine. Have you personally any duties to perform with respect to looking after the safety of the top?

A. Yes, sir.

Q. 37. What are those duties?

A. I examine that top myself.

Q. 38. Are you in the mine every day?

A. Yes, sir.

Q. 39. Are marks some times made on the top to indicate what somebody has thought as to the location of a dangerous condition, chalk marks?

A. Sometimes they are and sometimes there isn't.

[fol. 690] Q. 40. Well, now, when those marks are found, what is done about them?

A. We examine the place and find out what's wrong about it and try to find out what the mark is doing on there.

Q. 41. And if you find that the condition is dangerous there, what do you do?

A. We remove the bad piece of slate.

Q. 42. If you find the condition there is no- dangerous, what do you do?

A. Well, sometimes rub the mark off and sometimes just leave it stay there.

Q. 43. In other words, you don't do anything if it isn't dangerous?

A. That's right.

Q. 44. No, if an inside worker observes a place in the top that he considers dangerous, what is he supposed to do about that?

A. He is supposed to report—if it is too bad, he can danger off, stop it.

Q. 45. What do you mean by dangering off?

A. Allow no one to go in under it until he has notified some one about the rock.

Q. 46. Where does that report go?

A. I get it.

Q. 47. When you get the report, what do you do?

A. I look at it and find out about the location of this place and examine it and send the slate men to remove the rock.

Q. 48. How soon do you do that?

[fol. 691] A. Well, if it is after I come out of an evening—however, I send some one, but if I am inside and through the day, I can possibly reach this point, I go myself.

Q. 49. Do you ever leave a report like that for days and weeks without acting on it?

A. I have examined the place.

Q. 50. Do you ever wait for days and weeks before going to examine it, or do you do it immediately?

A. I do it as quick as I can get to it.

Q. 51. How quick is that, in the ordinary course of work?

A. I can get to any point within that mine within a couple of hours, anyway.

Q. 52. Do you always act on such reports within twenty-four hours, or within twelve hours, or how much?

A. I would say within twelve hours.

Q. 53. If there is no particular urgency about the condition, you say the people who are on the ground are authorized to take care of it?

A. That's right.

Q. 54. Now, in addition to the inspection that you yourself make of these haulways, are there any others whose duty it is or part of whose duty it is to look after the safety conditions on the haulways?

A. Yes, sir.

Q. 55. Who?

A. The assistant foremen and the safty inspector.

Q. 56. What are the duties of the safety inspector?

A. He makes inspection of the mine for all safety view-[fol. 692] points that he can find, bad top or any other thing that may develop there.

Q. 57. Then have you got a crew called the "scaling crew"?

A. Yes, sir.

Q. 58. What does it do?

A. Those fellows go along and take the reports that come in through the day and take down brows and loose top and clean up dirty track and stuff like that.

Q. 59. What can you say about the relative safety of the top in the haulways where man-trips run as compared with the general safety of the top in the mine? What I mean is are these haulways where the man-trips run the safest or are they the most dangerous or are they average or what can you say about that?

A. They are the most safest haulage that we have.

Q. 60. What can you say about the track on these haulways where the man-trips run as compared with the general track through the mine, the track in other parts of the mine, as to where the best and safest track is?

A. The best track we have is on the main line.

Q. 61. About these chalk marks that are made on the roof, do these chalk marks always indicate somebody's suggestion of danger or are they made for other purposes?

A. Well, they are made for other purposes. Occasionally, you will find a tram motor crew on the main line, he will go along and make a mark with a piece of chalk for the distance of a certain number of cars from a switch where he was go-Ring to back the cars in, and when his locomotive got under that mark, he would know he had the full length of his trip in.

[fol. 693] Q. 62. Does anybody else use that kind of mark?

A. Yes, sir, the engineers sometimes do it.

Q. 63. Do people sometimes have a piece of chalk and make them?

A. Yes, they just have too much chalk and want to do a little writing.

Cross-examination.

By Senator Muse:

Q. 1. Mr. Lovell, did I understand that you estimate it takes an average of from three to ten minutes for the men to get themselves—to do what is necessary to get ready to go in on a man-trip? That was your average, I believe?

A. That's right, sir.

Q. 2. Of course, you have never timed it? That's your best estimate?

A. I have timed it, sir.

Q. 3. If you have timed it, explain why you put it from three to ten minutes, is the thing I don't understand, if it's an average?

A. Because they pick up these parts they talk about working with at different points around the portal.

Q. 4. I just don't understand properly. You mean that you take a certain classification—I may illustrate one, like the trackmen, ten minutes, and it would take another classification three minutes, and you are giving us the

least time and the maximum time; is that the way you are calculating it? I just don't know?

A. Yes, sir.

[fol. 694] Q. 5. This three to ten minutes is the necessary preparation that these various men do in order to get ready for a particular man-trip; is that correct?

A. Sanding the motor and oiling it would be.

Q. 6. Things necessary for them to do in order to be ready to get on a man-trip or go in the portal; is that what you mean?

A. Yes, sir.

Q. 7. So while it takes some of them as much as ten minutes to do the necessary things to go in the portal, it will take others maybe not but three minutes; that's what you mean?

A. Yes, sir.

Q. 8. Of course, you are excluding the time to get the lamps, because all of them get those?

A. Yes, sir.

Q. 9. That's in addition to getting the lamps, the necessary preparation such as getting tools and supplies and so forth to go into the mine?

A. Yes, sir.

Q. 10. Now, is it your opinion that the man—take a machine operator who uses the motor, and I believe some do use a motor; that's correct, isn't it?

A. Yes, sir.

Q. 11. You think it would not take him more than ten minutes to get approximately fifty pounds of bits, two gallons of oil, get his oil can with his two gallons of oil in it, and go get his motor from on the yard and do whatever switching might be necessary for him to get out?

A. I will say that he can do it in ten minutes.

[fol. 695] Q. 12. I hadn't finished yet—bring his motor up to the sand box and put whatever sand is necessary in each of the four sand containers, sand boxes on the motor, and oil his motor, and put his oil can on the motor, put his approximately fifty pounds of bits on the motor, and get up to the portal to go in—you think it will take him not more than ten minutes to do that?

A. That's right, sir.

Q. 13. If he goes down and finds he has half a dozen motors in front of him, and he has to shift those out, it is

conceivable that it might take more than ten minutes, isn't it?

A. I don't think so.

Q. 14. You don't concede that under any circumstances, regardless of the number of motors he had in front of him, it would take him any more time than that?

A. He might have half a dozen other machine men there helping him do that ten minutes work to get away from there.

Q. 15. And he might not?

A. That's right, but he will get away in ten minutes.

Q. 16. Regardless of what the situation is, he is going to get away in ten minutes?

A. Yes, sir.

Q. 17. I believe you say he has the assistance sometimes of switchmen in telling him where to put the motors around the yard?

A. That's right, or he calls the dispatcher and the dispatcher tells him where to put that motor.

Q. 18. And you are there to help him, too?

A. Yes, sir.

[fol. 696] Q. 19. And you render him such assitsance and give him such orders as you think necessary?

A. That's right.

Q. 20. You do that with all the men, of course?

A. Yes, sir.

Q. 21. That's what you are there for. And, of course, some of them who take in less would naturally take less time—those who do less before they go in take less time?

A. Yes, sir, they take less time if they want to go on, but probably they will wait and go with the fellow who has taken ten minutes.

Q. 22. So far as the supplies are concerned, you have the supply crew that will take in the heavy stuff for him, if he wanted them to?

A. Yes, sir.

Q. 23. It has been customary, though, for the nine months you have been there, for the men to take in their own supplies?

A. They don't take in all of them.

Q. 24. I didn't say all. I say it is customary for them to take in most of the supplies?

A. I wouldn't say they took most of them; they take some small amount that they can handle.

Q. 25. Can a man handle a two hundred pound keg of bolts?

A. Two of them can.

Q. 26. They do take them in, don't they?

A. Once in a while.

Q. 27. They take them whenever they need them?

A. We send them when we have reports on them at night.

[fol. 697] Q. 28. Has it been customary since you have been there for the men to take them in?

A. Not all of them.

Q. 29. All would be one hundred per cent. I mean usually?

A. Some fellow who chooses to take them himself might get a keg once in a while.

Q. 30. Most of them choose to do it, don't they?

A. No, sir.

Q. 31. Do you have a supply clerk there in the morning?

A. Yes, sir.

Q. 32. If it is customary for you to send the supplies in on the night shift, with the night crew, why do you maintain a supply man there in the morning?

A. To issue out supplies for our locomotives.

Q. 33. Anything else?

A. He works in the lamp house.

Q. 34. Does he issue out supplies to these men?

A. He is working both places.

Q. 35. Does he issue out supplies to these men?

A. Yes, sir, if he has orders for something after he issues the lamps out.

Q. 36. You take the bond man, how would you send the bonds where he wanted them with the night crew?

A. By him leaving a report as to where he wanted them.

Q. 37. Has that ever been done since you have been there?

A. I can't recall if it has.

Q. 38. You can't recall a single occasion during the nine months you have been there when you have sent any bonds in?

[fol. 698] A. It hasn't been customary to send these bonds in. That man distributes these bonds one at a time when he welds them on the rail.

Q. 39. So, in so far as that man is concerned, he carries his supplies in?

A. He carries a small amount. I would say at one time

he didn't carry over twenty bonds.

Q. 40. How much will twenty bonds weigh?

A. I don't know.

Q. 41. You have some idea, don't you? Twenty would weigh about twenty-five pounds, wouldn't they?

A. At a rough guess. It would depend on the size of the bond.

Q. 42. Take the average size.

A. I don't know what they would weigh.

Q. 43. Do you think twenty pounds would be approximate?

A. Something near twenty pounds.

Q. 44. He also had the welding shield he takes in?

A. Yes, sir.

Q. 45. And he takes in the welding machine?

A. Yes, sir.

Q. 46. The welding machine weighs eighty pounds or thereabouts, at least, it is pretty heavy, isn't it?

A. I don't believe it will weigh eighty pounds.

Q. 47. I will take any number you say.

A. It might weigh twenty-five pounds. You get small ones and large ones.

Q. 48. I am not talking about the little bitty ones.

[fol. 699] A. I would say it won't weigh over thirty pounds at the most.

Q. 49. I won't take that. You say you examine the roof, if you have a bad report, as quick as you can get there, and that you get there within two hours?

A. That's right.

Q. 50. If you have a report about the roof over in Parallel, that's my favorite section, do you hustle yourself right over to look at it or do you wait until your routine takes you over there?

A. No, sir, I have the right to authorize the assistant foreman to go take care of that.

Q. 51. I am asking you what you do?

A. I go over to it myself.

Q. 52. Personally?

A. Yes, sir.

Q. 53. Do you go immediately?

A. Yes, sir.

Q. 54. You say it takes about two hours to get there. Do you walk or ride?

A. You can walk or either ride.

Q. 55. You could crawl, but how do you go?

A. Most of the time I ride.

Q. 56. Have you ever walked in your life from that portal to Parallel for the sole purpose of looking at a bad piece of roof?

A. Yes, sir, I have walked quite a few times through there and hunted for bad roof, and looked at it, too.

[fol. 700] Q. 57. I am asking you if somebody reported to you that there was a bad piece of slate in Parallel No. 1, and you left from the outside for the sole purpose of looking at it, if you ever walked over there?

A. No, sir, I never did walk through there and hunt for it.

Q. 58. When you have the report of the bad piece of slate in a particular section of Parallel, did you ever in your life time walk from the portal back there to look at it?

A. No, sir, I ride back there.

Q. 59. That's the thing I was trying to find out. That's all. Thank you, sir.

Redirect examination.

By Mr. Stuart:

Q. 1. Talking about these activities around the portal in the morning before the men go in, there are some men who have got these certain things to do that you have been asked about. Are there also some men who have nothing to do after they get the lamp but wait to get on the man-trip?

A: That's right.

Q. 2. Is that true of most of the men or just a few of them or what proportion?

A. Well, the most of them don't have anything to do.

Witness stands aside.

JOHN R. SHORTRIDGE, another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

[fol. 701] Direct examination.

By Mr. Stuart:

Q. 1. Mr. Shortridge, where do you live?

A. Jewell Valley.

Q. 2. Are you employed by the Jewell Ridge Coal Corporation?

A. Yes, sir.

Q. 3. In what position?

A. General mine foreman in No. 2 Mine.

Q. 4. How long have you held that position?

A. A little better than three years.

Q. 5. How long have you been employed by the Jewell Ridge Coal Corporation?

A. About thirteen and a half years now.

Q. 6. Mr. Shortridge, I want to ask you about what is done around the portal of the mine in the mornings before the men go into the mines. To what extent do the men who get there in the morning report just barely in time to catch the man-trip? I mean by that, how many of them will get there just barely in time, what proportion, and how many will get there earlier, with time to spare?

A. That depends on the way the busses run.

Q. 7. Take them generally.

A. The men who live in the camp start coming about six-thirty and the men are coming up to the mines from there on up until seven-thirty, which is the time the man-trip leaves.

Q. 8. Your man-trip in Mine No. 2 leaves at seven-thirty?

A. That's right.

Q. 9. You are different in that from Mine No. 1, where [fol. 702] they leave at seven o'clock?

A. That's right.

Q. 10. The men who get in there before they have to start occupy themselves in what way?

A. They stand around and talk, just killing time.

Q. 11. Are they under any supervision?

A. No, sir.

Q. 12. Now, there are some of the company men who have occasion to take something into the mine with them, a motor, a bag of supplies, or something of that kind, and have to do something in order to be ready to go in with this additional equipment or supplies, whatever it is. Is that true of most of the men at Mine No. 2, or just a few or how is that?

A. Just a few of the company men.

Q. 13. Where there are supplies of any considerable weight that a man is going to need during his day's work,

what is the practice at Mine No. 2 as to how you get those supplies in there?

A. The heavy supplies are delivered the night before, such as bolts and spikes, five to twenty pounds, and nails, from five to ten pounds, the spikes would run from twenty to twenty-five pounds, that's not every morning, I would say about two or three times a week for each section.

Q. 14. If a company man is going to need during the day some bolts and spikes to the extent you have just talked about, how are those taken in?

A. Well, if he is taking them in in small quantities, he takes them in in the morning.

Q. 15. Where does he get them?

[fol. 703] A. At the supply house.

Q. 16. How close is the supply house where he gets them to the place where the man-trip starts?

A. Well, just a rough guess, I would say three hundred feet.

Q. 17. You heard Mr. Lovell, who just testified before you, you heard his testimony, did you?

A. Yes, sir.

Q. 18. You heard his estimate that those of the men, those company men who do have to get something additional to take into the mines with them, when they have to do that, would consume in that time between certain limits. That was the testimony at Mine No. 1. I want to ask you what that would be at Mine No. 2, where you are?

A. Well, it would be about ten minutes. I have never timed it but I would say ten minutes.

Q. 19. Are you talking now about the longest time or the average time?

A. I would say about the longest time. That's about the time it would take to get from the supply house to the portal.

Q. 20. Take a motorman who has to get his motor ready, how long does it take him to do the preparatory things before he is ready to start?

A. It would take, I would say, five to ten minutes to sand up and oil that motor.

Q. 21. What about getting in the clear so he could go in, would that take him any time always or sometimes, and if so, what would that time amount to?

[fol. 704] A. That's true; if there was something in his way, it would take him longer than ten minutes.

Q. 22. It depends on whether something is in his way and how much is in his way?

A. There may be another motor in his way.

Q. 23. Does he have to move that or the man that that motor belongs to move it, ordinarily?

A. The man that motor belongs to moves it.

Q. 24. What would he do while that man is moving it; would he just be waiting there?

A. Yes, sir.

Q. 25. Now, as to those preparatory things that some of the men do in—where they have to take equipment or supplies in, please state whether in the length of your experience, they are the same things which similar men similarly situated have always done; is that true or is it not?

A. Yes, that has been the practice since I have been with the company.

Q. 26. To avoid possible repetition, Mr. Shortridge, you heard Mr. Lovell's testimony about the reasons why some company men would prefer to take in some supplies rather than have them taken in the night before by the supply crew. You heard his testimony about that as to Mine No. 1. Now, state whether you have the same situation at Mine No. 2 or if not, state what the difference is in that?

A. Well, I would say it is practically the same. With a small amount of those small supplies, if you sent them in the night before with the regular supply crew, they [fol. 705] would put them down just any where on the section and that may not be the point where the man that is going to use them wants them, therefore, it is more convenient for him to take them in as he goes in the morning.

Q. 27. When he takes in supplies of any considerable weight or inconvenience with him in the morning on the man-trip, it is because he would rather do it that way; is that it?

A. That's right.

Q. 28. Now, Mr. Shortridge, about those chalk marks on the top as indicating places of danger, you heard Mr. Lovell's testimony about that so you know what I am talking about. What do you do, you personally, in Mine No. 2 about looking out for the safety of the top in the haulways where the man-trips run?

A. Well, I personally inspect all haulage in addition to the section foreman's inspection and the safety inspection. When those things are reported, I make it a point to

either investigate it myself or have one of my foremen, if it happens to be on his section, have one of the foreman do it and have it taken down immediately.

Q. 29. If a man reports a dangerous place in the top, how soon do you act on that report—I am assuming it hasn't already been taken care of, before the report comes to you?

A. Well, as a usual case, I think it is just about every case, I don't know of any other—those reports are usually made in the evening at the end of the shift like, when the man-trip comes out, and the section foreman or some one reports to me there is a dangerous piece of rock on the haulage, and we have a slate crew that we detail to go and take care of this.

[fol. 706] Q. 30. Suppose the place is one where the danger is immediate and you shouldn't wait until the end of the shift, what's done in Mine No. 2 about that, if anything?

A. If that is reported to me, I go immediately and investigate this trouble, and if I find that it, in my judgment, if it needs to be taken care of immediately, we go ahead and do so, otherwise, we wait until a convenient time, which would be the following night.

Q. 31. Is there any arrangement or practice in Mine No. 2 about handling a dangerous condition immediately by the people who are right there at the time?

A. Yes, sir.

Q. 32. If so, what is that?

A. On a section haulage——

Q. 33. Confine yourself now to the man-trip haulways. We are not interested in the working places or the sections.

A. That's taken care of the same way as the others.

Q. 34. Has the man who finds it got any authority to remedy it if he has anything to do it with?

A. If he is the section boss, he has authority to immediately take care of it, or if it is some one working for the section foreman, he reports to the section foreman.

Q. 35. Suppose a place is reported as dangerous and it is inspected by the section foreman and by you, but the section foreman doesn't think it is dangerous and you don't think it is dangerous, what is done?

A. There is nothing done.

Q. 36. About these chalk marks, what can you say about them?

[fol. 707] A. Well, all the chalk marks, whether they are made by chalk or paint, does not necessarily mean bad top.

The engineers that run these profiles and set the points has certain reference mark crosses. Some times these things may, you may think that it is bad top which it isn't, and, too, people have a habit of just marking the top. I know lots of times I have found marks and examined the top and found it perfectly solid, and on passing under it, well, you would think it was a bad top, because it had the sign on it.

Q. 37. Every time there is a chalk mark on the top, that doesn't mean that it is a bad top?

A. No.

Q. 38. What, in your opinion, is the relative danger of the top in the haulways where the man-trips run as compared to the danger in the other workings of the mine? I mean by that, are these haulways where the man-trips run the most dangerous with respect to the top of the least dangerous, or what can you say about that?

A. No, they would be the most safe, they are the most safest.

Cross-examination.

By Senator Muse:

Q. 1. Mr. Shortridge, what time do you usually get to work in the mornings?

A. About six-fifteen.

Q. 2. Why do you come to work so soon?

A. Well—I like to get up early.

Q. 3. The man-trips don't start in until about seven-[fol. 708] thirty, do they?

A. That's right. The man-trip leaves at seven-thirty.

Q. 4. How far is it from the lamp house to the supply house, approximately—about six hundred feet, isn't it?

A. No, I don't think it is that far. I think I made an estimate a while ago of about three hundred feet.

Q. 5. I didn't catch it. I am sorry. So the man who gets his lamp goes about three hundred feet if he has to go to the supply house; that's approximately correct?

A. Yes, sir, about that.

Q. 6. I believe you said that your company will send in the heavy supplies?

A. They do.

Q. 7. Does a track man carry some bolts with him?

A. Yes, small quantities.

Q. 8. How many pounds would you say?

A. It runs—it is ten pound orders.

Q. 9. Ten pound orders?

A. Yes, sir.

Q. 10. What else would the track man carry with him?

A. I suppose if he is going to take some spikes, he would carry some spikes, too, and his dinner bucket, too.

Q. 11. About that many spikes?

A. Yes, I would say about twenty or twenty-five pounds of spikes but as a general rule, he doesn't take both kinds of supplies at the same time.

Q. 12. Takes them only one at a time?

A. Some times it happens that he has to have both kinds [fol. 709] but as a usual thing it is only one kind of supplies.

Q. 13. Maybe he will take spikes today and bolts tomorrow or he might take both tomorrow or might not take either?

A. That's true.

Q. 14. They do get those supplies, the smaller quantities you refer to, at the supply house, of course?

A. That's right.

Q. 15. And the various types of men, the coal loader, if he has any of his tools that have to be repaired, he takes them in, of course?

A. Yes.

Q. 16. And the track man takes in whatever tools he needs?

A. The track man leaves his tools on the section.

Q. 17. He doesn't leave them all on the section, does he?

A. Yes.

Q. 18. How about the bond man?

A. I can't answer that. He doesn't work for me and I don't have him around the mine very often.

Q. 19. You mean he works in both mines?

A. Yes, sir, that's true. I haven't observed his actions. I don't know very much about him.

Q. 20. The wire man who works on the trolley wire, he takes in his supplies and tools that are necessary?

A. That's right.

Q. 21. He works all over the mine, so when the day is over he brings them out and takes them back in the next morning?

A. Yes, he takes his tools in and out, of course.

Q. 22. You heard Mr. Lovell testify about the activities [fol. 710] outside in the morning by the various ones before they go in the mine?

A. Yes.

Q. 23. The situation at No. 2 is about like he described it at No. 1, isn't it?

A. I would say it is similar.

Q. 24. There isn't any substantial difference, is there?

A. I don't remember all the details of his testimony but I would say they are similar.

Q. 25. You don't recall any difference in his testimony?

A. I don't recall any difference.

Q. 26. In so far as the cross-marks are concerned, of course, the cross-marks do indicate bad roof or that somebody thinks it is bad roof?

A. I don't know, not in all cases, it isn't true.

Q. 27. Wherever a man attempts to show a bad roof, he puts a cross-mark?

A. That's right, but every cross-mark don't mean a bad roof.

Q. 28. I understand—the engineering crew may put it there, but a cross-mark is used to indicate a bad roof?

A. Yes, sir.

Q. 29. And when you see a cross-mark there, you examine it or one of your men does, to see if there is a bad roof?

A. Yes, sir.

Q. 30. Do the engineers put the mark on the side wall or the roof?

A. On the roof.

[fol. 711] Q. 31. You attempt to fix a bad roof as soon as you can?

A. That's right.

Q. 32. You are very careful about that?

A. As careful as we can be.

Q. 33. And in spite of all you can do, some times you make a mistake of judgment when there is a cross-mark up there and there is a bad roof there?

A. I don't recall any case of that kind.

Q. 34. Do you recall Mr. Curtis Shelton, a few months ago, having his back broken or being severely injured by a slate fall in your Mine No. 2 where there was a cross-mark on the roof and the slate fell on his back?

A. I remember the accident and I did not see any cross-mark, and at the investigation of the accident, it was proved that there was no one knew the rock was even damaged.

Q. 35. Hadn't that rock been reported to you?

A. No, sir.

Q. 36. You had no knowledge of it?

A. No, sir.

Q. 37. How many section foreman do you have in that mine?

A. Ten.

Q. 38. All of them are charged with looking after the roof, aren't they?

A. That's part of their duty.

Q. 39. You have one scale crew, I believe, or do you?

A. Most of the sections have a slate man. His duty is to scale the roof, and take care of the slate.

Q. 40. How many of the slate men do you have?

[fol. 712] A. I don't know right off the reel.

Q. 41. Give me approximately.

A. I would say on the sections we have six or seven slate men.

Q. 42. You have ten section foremen and six slate men and you look after slate, too, you look around?

A. Yes, sir.

Q. 43. So I will put you down. That's seventeen. In spite of the seventeen men who look around at the roof, or are charged with the duty of looking around at the roof, that roof did fall on Mr. Shelton, didn't it, or the slate did?

A. That's right.

Q. 44. It fell on one of the haulage ways, didn't it?

A. This was in a place on a section.

Q. 45. Wasn't he a brakeman?

A. Yes, sir.

Q. 46. And it fell, where he got hurt was where the tracks went, wasn't it?

A. Sure.

Q. 47. It was a passage way, wasn't it?

A. Yes.

Q. 48. And it was a passage way over which a motor and some tracks did run?

A. Yes.

Q. 49. And it was a haulway, wasn't it, because they haul over it?

A. Well, that's true.

Q. 50. All right, sir. And in spite of your careful investi-
[fol. 713] gation, circumspection and observation, the roof did fall and the man's back was broken?

A. That's true.

Witness stands aside.

J. Howard Miller, another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Richardson:

Q. 1. Will you give us your name, please.

A. J. Howard Miller, Jewell Ridge, Virginia.

Q. 2. What is your connection with the Jewell Ridge Coal Corporation?

A. Personnel manager.

Q. 3. How long have you been in the employ of that company?

A. Since April 15, 1936.

Q. 4. In your capacity as Personnel Manager, do you have charge of the compensation that is awarded to persons injured in the mining operations of the company?

A. That's right.

Q. 5. How long has the compensation been under your supervision?

A. Since April, 1943, this year.

Q. 6. How long have you had in charge the matter of looking into accidents?

A. Since January, 1940.

[fol. 714] Q. 7. Did you, in the year 1939, have any connection with that part of the affairs of this Company?

A. No.

Q. 8. Were you with them in the year 1939?

A. I was assistant foreman.

Q. 9. Who was in charge of the office that looked after accidents as reported?

A. A man by the name of Sam S. Clark.

Q. 10. Did you succeed to the office which he had?

A. Yes, sir.

Q. 11. Did you find and have you maintained the records which he kept in that office?

A. I have.

Q. 12. Since you came into that office in January, 1940, have you kept yourself fully informed of all accidents of any kind that occurred in connection with the operations of the Jewell Ridge Coal Corporation?

A. I have that.

Q. 13. Have you maintained full and complete records?

A. Yes, sir.

Q. 14. Does the company have any full and complete records of accidents which have occurred and injuries sustained by employees prior to January, 1939?

A. Not to my knowledge, unless they are compensable accidents.

Q. 15. Does it have detail records of all compensable accidents from that time?

A. Yes, sir.

[fol. 715] Q. 16. There has been some testimony in reference to an accident which occurred some years ago, causing the death of Tim Yeargain and Dominic Perechelli. Do you have any knowledge of that accident?

A. No, I do not, other than the compensation record on said accident.

Q. 17. Have you, upon request, dug back into the old records to find what you could about it?

A. Yes, sir.

Q. 18. Have you found a memorandum on that?

A. I did.

Q. 19. Who prepared it?

A. Mr. George W. St. Clair, at that time President of the Jewell Ridge Coal Corporation.

Q. 20. How do you know Mr. St. Clair prepared it?

A. By his signature attached to this report.

Q. 21. And do you know his signature?

A. Yes, sir.

Q. 22. That record was found in the files of the office which you now hold?

A. That's right.

Q. 23. I wish you would read into the record here what you found in that memorandum touching this accident.

A. (reading): Facts pertaining to the accident in which T. H. (Tim) Yeargain was killed. Accident occurred Friday night, September 26, 1930, between six and seven p. m. Tim was a member of a crew composed of Joe Smith, Foreman, Tim Yeargain, Dominic Perechelli and Al Freeman.

[fol. 716] This crew was going to South Main. Just before arriving at siding, and while on the main line, a gathering motor with five loads of slate got away from the motorman and a headon collision occurred. Joe Smith was injured as was Al Freeman, both getting scalp wounds. Both Dominic Perechelli and Tim Yeargain were killed.

Q. 24. From that memorandum, would you say whether that accident occurred in connection with a man-trip?

A. No, sir, I would not.

Q. 25. Did it occur on a man-trip or something else?

A. I would say it was a work-trip.

Q. 26. Mr. Miller, have you prepared a list of all compensible accidents which have befallen any employe of the Jewell Ridge Coal Corporation, either at the No. 1 Mine or the No. 2 Mine, from the first of January, 1939, to date?

A. I have.

Q. 27. In the first place, let me inquire if the company requires prompt report of every accident?

A. They do.

Q. 28. And to whom does such a report go?

A. The injured man is supposed to report within twenty-four hours to his foreman who is called an assistant foreman in the mines, or the section foreman, and they, in turn, make out their report, which is looked over and investigated both by the general mine foreman and by the Superintendent of Mines. That report is signed by these two men and then turned in to my office, from which we make our record. The injured man then goes to the doctor and he, in turn, makes out a report as to how the accident occurred and the nature of his injury. A copy of that also [fol. 717] comes to my office and we in turn, in our office, keep a case history card on each and every accident.

Q. 29. Upon receiving the report you have mentioned, do you look into the matter further?

A. Yes, sir.

Q. 30. Promptly?

A. Promptly on receipt of the accident report.

Q. 31. And as completely as may be necessary to inform you fully about the accident?

A. That's right.

Q. 32. You say you have prepared such a list. I hand you here a memorandum which purports to contain a list of compensible man-trip accidents, and ask you if this is a complete list prepared by yourself, showing all compensible

accidents which have occurred at any time to any employe of the Jewell Ridge Coal Corporation, on or in connection with man-trip movements from 1939 to date?

A. This is the list that I prepared, listing all the compensible man-trip accidents from January 1, 1939, until through October 31, 1943.

Q. 33. As to the year 1939, does that correctly reflect all of the accidents occurring on or in connection with man-trip movements as shown by the files in your office?

A. That's right.

Q. 34. And from January, 1940, to date, does it include all such accidents which have come to your attention in the manner you have described?

A. That's right.

[fol. 718] Q. 35. There are attached to this memorandum certain explanatory sheets, three in number, with notations and memoranda. Were they prepared by yourself?

A. Yes, sir.

Q. 36. Are they accurate and correct?

A. To the best of my knowledge and ability.

By Mr. Richardson: I regret that we do not have a copy of this paper. I shall submit it and ask leave to file it.

By the Court: Is there any objection?

By Senator Muse: No, sir.

The documents referred to were thereupon offered in evidence on behalf of the plaintiff, and were filed, marked as: "Plaintiff's Exhibit No. 45", and are returned as a part of this transcript.

Q. 37. Mr. Miller, I believe that this shows there have been in the four year period covered four compensible accidents connected with man-trip movements in the No. 1 Mine and two in the No. 2 Mine?

A. That's right.

Q. 38. Taking them altogether, how many man-trip movements are included in that report?

A. You mean consolidating the two mines?

Q. 39. Yes.

A. There has been 12,115 man-trips per compensible accident.

Q. 40. Do you mean there by man-trips, trips of cars in which men are riding or per individual man movement?

[fol. 719] A. No, trips of cars in which men have been riding, commonly known as man-trips.

Q. 41. Did you count the movement of the whole train of cars as one man-trip?

A. That's right.

Q. 42. And there have been 12,115 such man trips handled to each compensible accident?

A. That's right.

Cross-examination.

By Senator Muse:

Q. 1. As I understand, your records don't go back prior to 1938?

A. Nineteen and thirty-nine, including 1939.

Q. 2. From January 1, 1939?

A. That's right.

Q. 3. By the way, those two men who were killed that you referred to, could you tell by the report whether they were riding in one of the cars at the time they were killed or were they out standing on the track or walking on the track?

A. I understand they were riding in the car.

Q. 4. It is your understanding, is it not, that they were riding in one car that was being moved by a motor?

A. They had two cars, as I understand, riding in one and their tools in the other.

Q. 5. And they were killed by a collision between that movement and another one?

A. That's right.

[fol. 720] Q. 6. Now, Mr. Miller, the data that you have about the number of persons injured, you said the number of compensible accidents on man-trips for the period of time that your records show and that your exhibit shows, what do you mean by "compensible accidents" or "compensible injuries"?

A. Any accident in which the man who has been injured is paid compensation.

Q. 7. You mean any accident—your record shows any accident in which the employe on the man-trip was paid compensation under the Virginia Workmen's Compensation Law?

A. That's right.

Q. 8. Under the act, what is a compensible injury in so far as the loss of time is concerned?

A. Any accident that loses over seven days; the first seven days are not compensible.

Q. 9. Seven work days?

A. Seven days consecutively. Work days doesn't enter into it.

Q. 10. He has got to be injured to such an extent as not to be able to return to work in seven days?

A. That's right.

Q. 11. Suppose one of the man on the man-trip gets injured, gets his finger cut, and is able to return and does return to work in six days, does your record reflect that?

A. No, that's not a compensible accident.

Q. 12. And it is not reflected in your report, is it?

A. No.

Q. 13. That is true if you have a collision between two [fol. 721] movements, man-trips, and have a half dozen people injured, and they lose from one to six days, they wouldn't appear on that report, would they?

A. No.

Q. 14. So your report is confined to those people who were injured sufficiently bad to lose seven days from their work?

A. That's right.

Q. 15. What do you mean by a man-trip injury as distinguished from an injury that occurs in some other way?

A. An injury which occurs when a man is riding in what we commonly know as a man-trip. There are many ways in which he could be injured.

Q. 16. What do you understand a man-trip to be?

A. Any train of cars that carries the men from the portal to their working places.

Q. 17. Suppose the men are riding on the train of cars inside, but are not, at that particular moment going to their working place, would you include them?

A. How do you mean?

Q. 18. Take the two who were killed, these two were riding in a car and had a tool car with them and a motor collided with them. You expressed the opinion that you didn't think it was a man-trip. Tell us why?

A. They had this motor and car for their convenience in getting their tools to work.

Q. 19. Were they getting there at the same time the tools got there?

A. Yes, they used the car and motor in their work dur- [fol. 722] ing their hours of work.

Q. 20. They were going to the place of work, weren't they?

A. I don't know.

Q. 21. It looks like it from that report?

A. I still don't know.

Q. 22. But you do know the report says they had a motor, pulling two cars, and one was a tool car and the other car the men were riding in, and they had a wreck and the two men got killed?

A. Yes.

Q. 23. Still you express the opinion that it wasn't a man trip?

A. No.

Q. 24. Suppose a machine man who is using his motor going in in the morning to his place of work, he has a motor, and he has a wreck, would you consider that a man-trip?

A. No.

Q. 25. If he had a wreck, he wouldn't be on that report, would he?

A. No.

Q. 26. Suppose the drill crew, for instance, that has its own motor, while going in there to go to the place of work or coming out in the afternoon has a wreck, they wouldn't appear on that report, would they?

A. No.

Q. 27. How about a gathering motor that was hauling the men from the work room up to their powder house or man-trip station, would you consider that a man-trip?

[fol. 723] A. Just a single motor?

Q. 28. A single motor and a car that had some men?

A. If it was a car that had the men working on that section.

Q. 29. Where are the rest of the men. He has left half of them back in the section and put half in the car, would that be a man trip, in your definition?

A. That wouldn't be consistent.

Q. 30. You wouldn't consider that a man trip, would you?

A. Yes, that would be a man trip.

Witness stands aside.

The Plaintiff here rested its case.

The Defendants here rested their case.

[fol. 724] REPORTER'S CERTIFICATE

I, L. D. Wilmore, Shorthand Reporter, do hereby certify that I reported in shorthand the proceedings had and evidence offered and introduced on the trial of the case of Jewell Ridge Coal Corporation, a corporation, vs. Local No. 6167, United Mine Workers of America, et al., in the District Court of the United States for the Western District of Virginia, at Roanoke, and that the foregoing is a true and correct transcript made from my official notes taken at the time, and that the volume made a part of this transcript marked "Exhibits for Plaintiff and Defendants," contains the exhibits offered and introduced by both parties on said trial.

Given under my hand this 18th day of December, 1943.

L. D. Wilmore, Shorthand Reporter.

[fol. 725] IN UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted]

ORDER—Filed November 25, 1943

Pursuant to the provisions of the pretrial order entered herein on the 5th day of November, 1943, on the 17th day of November, 1943, came the plaintiff and all defendants, by counsel; and thereupon, the issues to be tried in this action having been stipulated and agreed to by all parties hereto as set out in said pretrial order, and that the same be tried by the Court without a jury, the introduction of testimony was begun by the plaintiff and continued from day to day until, on the 30th day of November, 1943, the plaintiff concluded its testimony and rested its case in chief.

And thereupon, on the 22nd day of November, 1943, the defendants began the introduction of their testimony and, on November 23rd, 1943, completed the introduction of their testimony and rested their case in chief.

And thereupon, on November 24th, 1943, the plaintiff introduced its rebuttal testimony and rested its case, and both sides rested. And the Court, after full hearing of all

testimony introduced by all perties hereto, and the arguments of counsel for the plaintiff and for the defendants, not being fully advised in the premises, takes under consideration its judgment; and it is ordered that counsel for the plaintiff and counsel for Southern Coal Producers Association, *amicus curiae,* be allowed until December 20th, 1943 to file their briefs, and that counsel for the defendants be allowed ten days thereafter within which to file their [fol. 726] briefs; and that counsel for the plaintiff be allowed five days after receipt of copy of defendants' brief within which to file its reply brief, if it be so advised.

And it is further ordered that the clerk of this court certify and mail copies hereof to George Richardson, Jr., Esq., 506 Commercial Bank Building, Bluefield, West Virginia, and William A. Stuart, Esq., Abingdon, Virginia, attorneys for the plaintiff, to Crampton Harris, Esq., 1618-20 First National Bank Building, Birmingham, Alabama, Frank W. Rogers, Esq., 306-317 Boxley Building, Roanoke, Virginia, Leonard G. Muse, Esq., 306-317 Boxley Building, Roanoke, Virginia, and Welley K. Hopkins, Esq., United Mine Workers Building, 900 15th Street, N. W., Washington, D. C., attorneys for the defendants; and to Edward R. Burke, Esq., 515 Southern Building, Washington, D. C., and John C. Gall, Esq., 701 Southern Building, Washington, D. C., attorneys for Southern Coal Producers Association, *amicus curiae.*

Enter: (S.) A. D. Barksdale, District Judge.

[fol. 727] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted]

DEFENDANTS' REQUEST FOR FINDINGS OF FACT—Filed January 10, 1944

(A) General Description of Mines

Plaintiff operates two coal mines, one at Jewell Ridge and the other at Jewell Valley, both in the Western District of Virginia. Both are known as "drift" mines, because the seams of coal, which are approximately horizontal, lie at an elevation above the railroads that serve

them. The thickness of the seam at Jewell Ridge averages 44 to 54 inches (page 7). At Jewell Valley it averages 32 to 44 inches (page 72). The mines have operated for a number of years, so that the places where the coal is mined are at a considerable distance from the mouth or portal of the mines. At Jewell Ridge the distance from the portal to the various working faces varies from 4,250 feet to 25,960 feet (Exhibit 16). At Jewell Valley, the distance varies from 4,600 feet to 14,450 feet (Exhibit 25). Approximately 500 men are employed at each mine.

[fol. 728] (B) Haulageways

Tunnels, called "haulageways", run from the portal of each mine with lateral extensions to the working faces. The average height at Jewell Ridge is 60 to 65 inches for main haulageways and 46 to 48 inches for secondary haulageways (page 315). At Jewell Valley the average height is 48 inches on the main line and 42 inches on the secondary haulageways (page 316). In the lateral extensions the height in both mines is considerably less than on the main haulageways. In some places at Jewell Ridge a man can walk erect in the main haulageways, but practically nowhere in the lateral extensions or at all at Jewell Valley. An unballasted track of cross-ties and steel rails is laid along the floor of the haulageways. No walkway is provided. The track is cluttered with coal that drops from loaded cars. The haulageways are quite narrow in places, so that cars will not clear a man walking beside the track. Over the right rail going in is suspended from the roof an exposed electric trolley wire to furnish power for the electric locomotives or motors that pull the cars.

(C) Lights

Haulageways are partially lighted with electric bulbs fed from the trolley wire. It is not practicable to run the trolley wires up to the working places where the miners dig coal. The only light there is furnished by small electric headlamps worn by each miner and fed by a five-pound battery carried by him.

(D) Drinking Water

There is no water system in the mines. Each miner must take in with him enough drinking water to last him

during his shift, as the plaintiff does not provide men to carry water to the workers.

(E) Man-trips

(1) Composition

For the purpose of transporting underground employees between the portals of the mines and "man stations" in [fol. 729] the vicinity of their working places, the company operates "man-trips". The latter consist of empty mine cars hauled by an electric motor. These are the same cars used for hauling coal out of the mines and are not cleaned or protected from the weather before being used on man-trips. Except in a few places on the main haulageways at Jewell Ridge, the roof clearance is not sufficient to permit a man to sit erect while riding on a man-trip. At Jewell Valley and at some places on laterals at Jewell Ridge a person riding a man-trip must bend almost double.

(2) Operation

All man-trips originate at the main portal. Those going to the most distant sections of the mine leave first. At Jewell Valley a separate man-trip runs to each section. At Jewell Ridge the practice, at least until quite recently, was to consolidate for a portion of the journey man-trips going toward the same general location. These man-trips were hauled by the larger motors, called "main line motors". As branch haulageways would be reached, the cars of men and their tool car going to that particular section would be disconnected from the train. A smaller motor, known as a "gathering motor", would then take them to their destination. Just before the beginning of the trial the Jewell Valley practice appears to have been adopted at Jewell Ridge.

(3) Company Control

The company fixes the schedules for the man-trips. It designates the cars that go to the various sections and requires the men to ride in the cars designated. Each section foreman is on hand at the portal when the men report at the appointed time. He supervises the loading of the man-trips and rides in one of the cars going to his section. He is in complete charge of the man-trip and gives such orders

as he deems appropriate for the operation of the man-trip [fol. 730] and the safety of the men riding thereon. When necessary he discusses with the men the work that they have done or are to do and issues instructions to them concerning the places to which they shall go to work or the duties to be performed after reaching their working places. The speed of the man-trips, the order in which they enter and leave the mine, the directness with which they go to the several sections and their sidetracking to permit other trains to pass are all controlled by the company.

(F) *Travel Between Terminus of Man-trip and Working Places*

The termini of the man-trips are called "man stations". They are from time to time advanced farther into the mine as the working faces are driven deeper into the mountain. The distance from the man stations to the working seams varies from a few hundred feet to more than a quarter of a mile. This distance must be traveled by the men on foot, carrying such tools, supplies and equipment as may be necessary, and with their backs in a bent-over position in order to avoid contact with the low roof.

(G) *Necessity for Man-trips*

At Jewell Valley all underground workers board the man-trip at the main portal. This is also true at Jewell Ridge except as to 72 men. Of those 72, all except some 4 or 5 board the man-trip at other entrances that are more convenient to their homes but not accessible to the other men. Occasionally coal loaders working in sections nearest the portal will walk out if they happen to have "cleaned up" their rooms a good while before the scheduled departure of [fol. 731] the man-trip at the end of the shift. The use of the man-trips is necessary in the efficient operation of the mines in order to maintain the volume production of coal. They conserve the time and energy that would otherwise be expended by the men in walking such long distances under such difficult conditions; they prevent delays that would arise if the men were permitted to straggle in one by one; and they eliminate the danger and confusion of trying to operate trains while men were thus using the haulageways.

(H) *Hazards of Underground Travel*

(1) Generally

During 1941, the last year for which statistics are available, there were reported to the United States Bureau of Mines the following accidents to the 450,000 men then engaged in coal mining:

Fatalities	1,075
Permanent total disability	66
Permanent partial disability	1,960
Temporary disability	44,641
Total	47,742

On the assumption that those figures are representative, more than one out of every ten coal miner- suffers an injury by acident each year. Figures are not available as to the proportions of those injuries received by miners while traveling underground.

(2) In Plaintiff's Mines

No figures were submitted in the instant case as to the total injuries sustained by accident to underground workers in the plaintiff's mines. No record at all was kept by the plaintiff of accidents that involved the loss of less than [fol. 732] seven days' time. The defendants testified as to numerous accidents to men riding on man-trips. Few of them were serious enough to result in the loss of seven days' time. They were caused by slate falling from the roof, by collision with other trains or obstacles on the track, by contact with a trolley wire, by the breaking of the trolley wire and by the derailment of cars.

(I) *Routine of Cutting and Mining Coal*

(1) Entries and Rooms

The first coal that comes from a mine results from the driving of a tunnel that is to be used as a haulageway. This is constantly repeated as the haulageway is driven further into the mountain. From the haulageway are driven laterals, called cross-entries. These cross-entries give access to and form the boundaries of "rooms", from which all of the coal is taken except the pillars that are left to support the roof.

(2) Cutting

Between shifts the machine men make with an electric machine a cut six inches in height at the bottom of the seam and parallel to the floor, which cut extends across the width of the working place and back into the coal to a depth of six or eight feet. When the "loader" arrives at the beginning of his shift, his first task is to remove with a long-handle shovel the "bug dust" (kerf from the cutting machine). Next he uses a long auger to bore at the top of the seam holes to the same depth as the undercut. He then fills those holes with explosives. The force of the charge dislodges that section of the coal that has been undercut, pushing it down and outward. With pick and shovel the miner then proceeds to load into empty coal cars placed by gathering motors the coal thus shot down.

[fol. 733] (J) *Services Performed Before Reaching Working Places*

All employees perform some services for the company before reaching their usual working places. The amount and frequency of those services vary with the different classifications of employees.

(1) Machine Men

Some of the machine men use motors and others ride man-trips. They get two gallons of oil from the oil house, approximately fifty pounds of machine bits from the blacksmith shop and such other equipment as may be necessary, including at times rope, fingers for starting box and jack pipe.

The machine men who ride man-trips load these supplies and equipment onto the tool car of the man-trip that they ride. Those who have motors load their supplies and equipment onto their motors. But first they must get their motor out of the yard and switch it to the sand house, where they fill the four sand boxes and oil the motor. They then run their motors to their assigned places of operation in the mine. The process is reversed at the end of the shift.

(2) Trackmen

Trackmen get from the blacksmith shop such tools as may have been brought out for repair. If bolts and spikes

are needed, they get them in kegs weighing approximately two hundred pounds and load them into the tool car on the man-trip that they ride. Some of the trackmen take in steel crossties and once or twice a month a number of angle bars.

(3) Motor Men and Brakemen

Motormen and brakemen go through the same process of getting oil and sand for their motors as is described in connection with the machinemen in (1) above.

[fol. 734] (4) Brattice Men

Brattice men carry from the supply house to the tool car of the man-trip eight or nine pounds of nails and, as needed, cement, bolts, hinges, plaster and rolls of brattice cloth. The latter weigh between sixty and a hundred pounds.

(5) Wiremen

Wiremen load onto the tool car each day their usual small tools, Stilson wrenches, hammers, chain blocks, "come-alongs", wire splicers, drills, hack saws, hatchets, braces and bits, clip wrenches and bell wrenches. Copper wire in lengths of one hundred or more feet, blow torches and solder are taken in as needed.

(6) Bondman

The bondman gets from the supply house and loads into the tool car along with his pick some fifty to seventy pounds of bonds and several pounds of welding steel. Welding shields and welding machines are taken into the mine by him some three or four times a week.

(7) Coal Loaders

From the blacksmith shop the coal loaders get and take to the tool car some four or five times a month such of their working tools as may have been brought out of the mine for repair. These tools consist of picks, shovels, augers, breastplates, tamping bars, wedges, axes and saws.

(K) *Services Continue In Transit*

The loading of tools, equipment and supplies into a tool car or onto a motor for transportation into the mine is

merely the beginning of a continuous service. Each employee is charged with the responsibility of following through to its destination whatever he may have loaded into [fol. 735] a tool car or onto a motor. The men see that the tools, equipment and supplies are unloaded and in most instances themselves carry them to the place at which they are to be used. When the men do not themselves carry them, they personally see that they are brought to the right place. The reverse is true as to tools, equipment and unused supplies brought out of the mine. Motors are brought out of the mine at the end of each shift for the purpose of being sanded, oiled, and occasionally repaired. This, as well as the servicing of the motors outside the portal, is a substantial service for the benefit of the company.

(L) *Pay of Underground Employees*

Coal loaders and some of the machine men are paid on a tonnage basis. Their tonnage rates are fixed on the basis of the amount of coal that should be loaded or cut per hour spent at the working place. Other employees are paid on an hourly basis for the time actually spent at their assigned working places. None of the employees is paid for the time spent in travel between the portal and his working place, nor for pre-portal or post-portal services. For instance, the pay of the crew of a gathering motor does not start until they reach the section of the mine in which they operate at the hour designated for the beginning of the shift and ends when they leave that section at the hour designated for the ending of the shift. They receive no pay for the time spent or services performed in taking their motor in and out of the mine and oiling and sanding it outside the portal. None of the basic rates have been loaded to include pay for travel time, pre-portal services or post-portal services, as contended by the plaintiff.

(M) *Compensation for Accidents on Man-trips*

The Virginia Workmen's Compensation Act covers "injury by accident arising out of and in the course of the employment". Under this law the plaintiff company has consistently recognized as compensable injuries sustained by accident on man-trips whenever resulting in the loss of [fol. 736] seven days' time.

(N) *Negotiation of Contracts*

So-called basic contracts covering wages and working conditions for the coal industry as a whole are periodically negotiated between the international officials of the United Mine Workers and representatives of the different associations of coal operators. The provisions of those contracts are embodied in district agreements subsequently executed between district officials of the United Mine Workers and the district coal operators' associations, which district agreements include other provisions of district application not inconsistent with the basic contract. The district agreements are in turn subsequently embodied in a local agreement executed by the two local unions that are parties defendant and the plaintiff, which local agreements include other provisions of local application not inconsistent with the basic contract. There is no binding agreement between the plaintiff and its employees until this local agreement is executed (page 54).

(O) *No Contract Since March 31, 1943*

The last basic contract or national agreement became effective as of April 1, 1941, and expired by its own terms on March 31, 1943. A district agreement was subsequently executed by the district officers of both the international union and the association extending for the month of April, 1943, the district agreement that expired on the preceding March 31. The district extension agreement did not have the effect of extending the local agreement between the plaintiff and its employees because: (1) it was never ratified or adopted by local agreement between the plain- [fol. 737] tiff and its employees, and (2) the district extension agreement was predicated upon an express condition subsequent that was never performed, namely, the negotiation of a new contract that would be retroactive to April 1st, 1943. Without the consent of the defendants and over their objection, the War Labor Board undertook to issue directives extending beyond April 30, 1943, the terms of the agreements that expired on March 31, 1943.

(P) *Basic Contracts and NRA Code Provided Pay Only for "Hours of Labor"*

The basic contracts (Exhibits 7, 8, 9 and 10) covering the period since the NRA Bituminous Code provide pay

only for hours of actual labor: "Seven hours of laber shall constitute a day's work. The seven-hour day means seven hours' work in the mines at the usual working places." The testimony for the plaintiff is that the language of the NRA Code and basic contracts prior thereto is similar, if not identical, except that the number of hours of labor constituting a day's work was changed from eight to seven during the existence of NRA. The testimony for the plaintiff is further to the effect that underground employees of coal mines in the United States were paid on this basis even before they were organized by the United Mine Workers of America. None of the basic contracts or other agreements define or even refer to *hours of employment.*

(Q) *Administrative and Contemporaneous Interpretation*

Shortly after the effective date of the Fair Labor Standards Act a group of coal operators wrote a letter (Exhibit 19) to the Wage and Hour Administrator charged with its enforcement expressing the opinion that the method of computing wages under the basic contracts was not in [fol. 738] violation of the Act. Houck, an official of the United Mine Workers of America, joined with the operators as a co-signer of that letter. In response thereto the Administrator issued an informal ruling (Exhibit 20) to the effect that the existing arrangement was "not unreasonable," a pronouncement for which there was no statutory authority. On November 3, 1943, Secretary of Interior Ickes in his official capacity as Solid Fuels Administrator entered into a contract with the United Mine Workers of America providing for the payment of underground mine workers throughout the United States on the basis of "hours of employment," i. e., from portal to portal. That contract was approved by the War Labor Board. It is a matter of common knowledge that since the conclusion of the testimony in this case the producers of seventy per cent of the coal of America, including some members of the instant *amicus curiae,* have agreed upon a new contract based on portal-to-portal pay, the effective operation of which new contract awaits only the approval of the necessary governmental agencies.

(R) *Portal-to-Portal Basis in Other Countries*

Coal miners in every civilized country of the world except the United States are paid on a portal-to-portal basis.

(8) *First Invocation of Statute*

Consistently with the contemporaneous construction placed upon the Fair Labor Standards Act by members of the industry generally, defendants did not assert their present contention that the Act is applicable to them until the wage conferences of March, 1943, shortly after the District Court had held in the Tennessee Ore case that underground travel time should be included within the hours of employment. At that conference representatives of the miners agreed to accept a general pay increase of $2.00 [fol. 739] a day to cover travel time.

Findings Requested by Plaintiff

In the foregoing paragraphs the attempt has been made to state all of the material facts of the case. The findings requested by the plaintiff are so interwoven with argument and legal conclusions that it is difficult to categorically answer them. The substance of the plaintiff's requested findings of fact has been above incorporated, in so far as they can be separated from argument and conclusions.

Respectfully submitted, (S.) E. Crampton Harris, 1618-20 First National Bldg., Birmingham, Alabama; (S.) Frank W. Rogers, 306-17 Boxley Bldg., Roanoke, Virginia; (S.) Leonard G. Muse, 306-17 Boxley Bldg., Roanoke, Virginia; (S.) Welly K. Hopkins, 900 15th Street, N. W., Washington, D. C., Counsel for Defendants.

[fol. 740] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

Findings of Fact and Conclusions of Law—Filed January 25, 1944

STATEMENT OF THE CASE

This is a declaratory judgment action instituted by Jewell Ridge Coal Corporation, the owner and operator of two bituminous coal mines in this District, against two locals of the United Mine Workers of America and certain officials

and committee members thereof, District No. 28, United Mine Workers of America, and its officers, and International Union, United Mine Workers of America and its president. The two defendant locals of the Union comprise all of the underground mine workers employed by plaintiff, said two locals being within the jurisdiction of said District 28, said District 28 in turn being a component of the International Union, United Mine Workers of America. The complaint alleges, the joint answer of all defendants admits, and the evidence proves, the existence of an actual justiciable controversy between plaintiff and defendants as to the construction of Section 7 of the Fair Labor Standards Act. By pretrial order, it was stipulated that the issues to be now tried in this action are as follows:

"a. What constitutes the working time which makes up the work week of plaintiff's underground employees within the meaning of Section 7 of the Fair Labor Standards Act of 1938, and what amounts, if any, are due and unpaid to such employees under said Section, the determination of such amounts, if any, to be later [fol. 741] referred to a special master:

"(1) In reference to 'a' above, the plaintiff contends that such work week does not include that portion of the time spent by its underground employees in being transported or walking to and from their usual working places.

"(2) In reference to 'a' above, the defendants contend that such work week included all the time from the time such employees are required to report and do report for work at the portal of the mine until they return to the portal at the end of the shift, less the regular lunch period when they are relieved of all duties."

Neither side having demanded a jury, evidence adduced by both sides has been fully heard in open court by the court without a jury, oral argument has been heard, and briefs have been filed on behalf of both sides, and a brief has also been filed by Southern Coal Producers Association (of which plaintiff is a member), whose petition for intervention was denied, but which was permitted to participate as an *amicus curiae*.

This action having been tried upon the facts by the court without a jury, the court doth hereby find the facts specially and state separately its conclusions of law thereon, and directs the entry of the appropriate judgment, as follows, in conformity with Rule 52(a) of the Federal Rules of Civil Procedure.

Findings of Fact

Plaintiff, Jewell Ridge Coal Corporation, owns and operates two coal mines within this District, the older one being known as the "Jewell Ridge Mine" and the other being known as the "Jewell Valley Mine." The Jewell [fol. 742] Ridge Mine was opened in 1910, and the Jewell Valley Mine in 1936. Both mines having been in operation for a number of years, the coal now being mined is at a considerable distance from the drift-mouth or portal of the mines. Jewell Ridge being the older mine, the distances there are naturally greater, and vary from approximately 4,250 feet to 25,460 feet: at Jewell Valley, the distances vary from approximately 4,600 feet to 14,450 feet. Approximately 500 men are employed at each mine. Although there are slight differences, the methods of operating the two mines are substantially the same.

The coal which is mined at these two mines exists in seams, the thickness of which varies in the two mines from 32 to 54 inches. The main tunnels into the mines, from which coal has been extracted, are known as "haulage ways". From these haulage ways, laterals have been driven which are called "cross entries". These cross entries give access to, and form the boundaries of, "rooms", from which all the coal is taken except the pillars that are left to support the roof. Electric railways are operated for the removal of the coal when mined, and the men are also transported to and from their places of work on these railways. The company has numerous employees for the operation and maintenance of these railways and the electric power systems and the maintenance of safety within the mines, such as motormen and brakemen, trackmen, brattiemen, wiremen, and a bondman. These employees are all called "company men" and are paid at hourly rates. The employees who actually extract the coal from the seams, are known as "machinemen" and "coal loaders". The method is about as follows: Between shifts, the machinemen place their cutting machines at the

faces of the seams. Each machineman then makes a cut or kerf, approximately six inches in height, at the bottom of the seam of coal and parallel to the floor, which cut extends across the width of the room or working place and back into the seam to the depth of six or ei-*th* feet. The fragments from this cutting, called "bug dust", are first removed by the "coal loader" when he begins his work, by means of a long-handled shovel. The loader then bores [fol. 743] holes at the top of the seam of coal to the same depth as the undercut. He then places explosives in these holes and fires them. These explosions dislodge the entire section of coal which has been undercut, pushing it down and outward. The loader, with his pick and shovel, then proceeds to load the coal thus shot down, into empty coal cars placed adjacent to his work place by operators of gathering motors. The coal is then hauled out to the tipple, processed, graded, and ultimately loaded into railway cars for shipment. All coal loaders, and ordinarily, the machinemen, are paid upon a piece-work basis, that is, at an agreed rate for each ton of coal. The hours of labor of these piece-work employees are, however, important, because they are paid a time-and-a-half rate, or more accurately, a rate-and-a-half rate, for coal extracted by them after the expiration of seven hours of labor.

All plaintiff's employees are required to be at their places of work, for the morning shift, at 8 o'clock, A. M. The men come from their homes to the mines in various ways. Some walk, some come in their own cars at their own expense. More than 400 come in trucks and buses operated for that purpose by the plaintiff company and certain individuals, the expense of such transportation being borne by the company. The employees arrive at the mines at various times, but each in time to board the "man-trip" which is to take him to, or near, his respective place of work. "Man-trips" are trips made by trains of mine cars drawn by electric locomotives for the purpose of transporting the underground workers to or near their respective places of work. Employees leave the trains at the "man-trip stations" which are nearest to their respective places of work, and walk the rest of the way.

Upon arrival at the mines, each underground worker first obtains his lamp from the company's lamp house near the portal, which is an electric light that has been charged

while the employee is off duty. Each underground worker carries with him such drinking water as he needs for the day, as well as his lunch.

After securing their lamps, various men do various things before taking the man-trip. Coal loaders, the most numerous class, do nothing, unless they have brought tools [fol. 744] out for repair. Some four or five times a month, they bring tools out for repair, and on such occasions they go by the blacksmith shop and obtain their repaired tools. The bondman, wiremen, bratticemen, trackmen, and such machinemen as ride man-trips, get such tools as they may have brought out of the mine from the tool house, and such supplies as they may need for the day, from the supply house, and load them into the tool cars of their man-trips. However, if these men so desire, they have the option to give their orders for supplies to the section foreman, and such supplies will be delivered on their section overnight by the supply crew. Some machinemen use motors, and those who do, get two gallons of oil from the oil house, approximately 50 pounds of machine bits from the blacksmith shop, and such other equipment as may be necessary, and load such supplies and equipment onto their motors. They get their motors out of the yard, switch them to the sand house, where they fill their four sand boxes and oil the motor. They then run their motors to their assigned places of operation in the mine. Motormen and brakemen go through substantially the same process of getting out their motors and oiling and sanding them, as the machinemen do, before proceeding in the motors to their places of work. These preliminary activities require variously from three to ten minutes.

As previously stated, "man-trips" are for the transportation of underground workers to or near their places of work. They are operated by, and at the expense of, the company. At the Jewell Valley Mine, all underground workers use the man-trips to travel from the main portal to their places of work; at Jewell Ridge, approximately 72 men enter the mine at places other than the main portal and catch the man-trips at some man-trip station inside the mine, or walk all the way to their places of work. Their lamps are brought to them by their section foremen. Transportation for employees by man-trips is necessary for the successful operation of the mines. They constitute a benefit to both employer and employees. They benefit the

company in promoting safety, orderliness and increased productiveness: they benefit the employees by saving their time and energy, and thus increase their productiveness. [fol. 745] Each man-trip is composed of a train of empty mine cars such as are used to haul coal, drawn by an electric motor or locomotive. The first car after the locomotive, is the tool car, in which is hauled all mining tools and supplies of the men who ride that man-trip. No one is permitted to ride in the tool car. Ordinarily, seven men ride in each of the other cars of the train, never more than eight. Each car is about 12 feet long and seven feet wide inside. The bottom, or lowest part of the car, is 2 feet, 6 inches, wide. Alongside of that area, and rising above it, is a sort of bench approximately 2 feet, 3¾ths inches, wide, and above that, rise the outside walls of the car to the height of 11 inches. Men riding in these cars ordinarily sit on the bench, or, where the top is low, in the bottom of the car. The man-trips are scheduled, those going the greatest distances leaving first, and an interval between trains of at least 500 feet is maintained. The movement of the trains is governed by dispatchers, and the speed of the trains is kept within a maximum of six miles per hour as nearly as practicable. Each man-trip is under the supervision of a foremen, who sees to it that safety rules and regulations are complied with. During the course of the man-trips, foremen occasionally give instructions to employees as to the work they are to perform at their working stations. Such instances are rare, as instructions are ordinarily and customarily given at the working place. No work or labor is required of employees while riding on man-trips, and supervision is limited to the enforcement of safety rules and regulations. Those riding on man-trips sit upright where the roof is high enough, but find it necessary to bend over where the roof is low. Riding on man-trips, while definitely not luxurious, is neither painful nor unduly uncomfortable, and is less hazardous than other phases of mining operations. All coal mining operations are relatively hazardous. During 1941, the last year for which statistics are available, there were reported to the United States Bureau of Mines, 47,742 accidents, of which 1,075 were fatalities. Assuming that 450,000 men were then engaged in coal mining, the reported accidents represent an accident of some character to more than one out of [fol. 746] every ten coal miners during that year. In view

of these statistics, and the number of men traveling daily on man-trips in plaintiff's mines, the injuries shown by the evidence to have been received by employees in plaintiff's mines on man-trips are surprisingly few in number and extent.

If Section 7(a) of the Fair Labor Standards Act requires inclusion of travel time as work time, many, if not all, of plaintiff's underground employees have not received all the compensation required by the Act.

Both plaintiff's mines, from the very beginning, have always been operated on the "face to face" basis. The "face to face" basis means that hours of labor are computed on the basis of work at the usual working places, and therefore excludes any consideration of travel time spent in reaching the usual working places and returning therefrom. The "face to face" basis is traditional in the bituminous coal mining industry in this country, and has universally been the basis for the determination of hours of labor therein for approximately the past fifty years. In England and Continental Europe, the basis has been "bank to bank", or portal to portal, or some modification thereof.

Plaintiff's employees were first organized and became members of the United Mine Workers of America in 1933 following promulgation of the NIRA Code of Fair Competition for the Bituminous Coal Mining Industry. This NIRA Code of Fair Competition was drawn up for the industry by representatives of the Union and the Operators, and was approved by the President of the United States. It provided for the "face to face" wage basis by the use of the following language:

> "* * *, and this means seven hours work at the usual working places for all classes of labor exclusive of the lunch period * * *"

Basic wage agreements were entered into by the Union and the Operators, as of April 1, 1934 (continued in effect by successive extension agreements from March 31, 1935, until October 1935), as of October 1, 1935, as of April 2, 1937, and as of May 12, 1939. All these agreements were the result of collective bargaining. The last mentioned agreement, as of May 12, 1939, to extend for a period of

[fol. 747] two years, was made when the Fair Labor Standards Act was nearly a year old and had been in effect for more than six months. Nevertheless, it, as well as the previous wage agreements, provided for the "face to face" wage basis, necessarily excluding all travel time from the work week. Also the last basic wage agreement reached by collective bargaining, dated April 1, 1941, to extend for a period of two years, provided for the "face to face" basis, in the familiar language of the preceding agreements.

Early in 1940 an investigation by the Office of Wage and Hour Administration of the operation of the Monroe Coal Mining Company in Pennsylvania was begun, to determine whether or not that company's operating practices complied with the Fair Labor Standards Act. In the course of that investigation, the investigator raised the question of whether or not underground travel time of employees must be included in the work week under the terms of the Act. After an extended investigation, the investigator made an exhaustive report in which he discussed at length the matter of travel time and stated as his opinion that the "face to face" basis, excluding travel time, was the proper one to be applied in the coal mining industry, but he indicated that if the rule as applied in the *Cornucopia Gold Mining Company* case were applied, the Monroe Company would owe its underground workers approximately $70,000.00.

This situation was brought to the attention of Mr. Charles O'Neill, President of the Central Pennsylvania Coal Producers Association and a Director of the Monroe Company. He in turn brought it to the attention of other coal operators and of Mr. John L. Lewis, President of the International Union, United Mine Workers of America. Thereafter, representatives of the coal operators and the United Mine Workers conferred from time to time with representatives of the Office of Wage and Hour Administration. Both the Operators and the Union officials were definitely opposed to any construction of the Fair Labor Standards Act which would require payment for travel time. On July 9, 1940, the members of the Appalachian Joint Conference Negotiating Committee, for the Operators, and Mr. Earl E. Houck, Director of the Legal Department, for the United [fol. 748] Mine Workers of America, jointly composed and sent a letter to Col. Philip B. Fleming, Adminstrator of the Wage and Hour Division, fully setting out their views

on the subject. Amongst other things in their letter, they said:

> "This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years, and is the result of collective bargaining in its complete sense.
>
> * * *
>
> "The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual working place. Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898.
>
> "It is urged that any ruling requiring such a change in the custom, tradition and contract provision so as to change the work day from 'seven hours' work in the mines at the usual working places' to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated. In such an event, it would make necessary the reassembling of the Appalachian Joint Wage Conference and it would be faced with an issue that would be almost impossible of solution by agreement, resulting in an industrial conflict that could paralyze the nation. This would be a most unhappy result to flow from an act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates

of pay, as contrasted with the short hours and the high rates of pay in the bituminous coal mines. The great amount of money involved in the case of extra payment by the operators or the great changes that would be required in the rates of pay to the miners, should any change in the present contract be necessary by reason of a new standard for the measurement of time worked, is so serious that a negotiated adjustment would seem to be impossible.

"For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, and the definition of working time, as set forth in the Appalachian Agreement (which embodies the custom and traditions of the bituminous mining industry), as complying both with the provisions of the Fair Labor Standards Act and of the Interpretive Bulletin No. 13, to the effect that 'reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act.'

"We therefore respectfully request that your Divi- [fol. 749] sion issue a supplement to Interpretive Bulletin No. 13, stating that the standard of wages and hours of work and definition of working time, set forth in the Appalachian Agreement, entered into on May 12, 1940, between twenty-three district associations of bituminous coal operators comprising the Appalachian coal producing area and the International Union, United Mine Workers of America, and the several district agreements based thereon, conform to and satisfy the requirements of the Wage & Hour Act."

By letter of July 18, 1940, from Co-. Fleming, Administrator, to Mr. Houck, Director of the Legal Department of the United Mine Workers of America, Col. Fleming, referring to Mr. Houck's letter of July 9, 1940, just referred to, said in part:

"In view of the circumstances which you describe in your letter, and in view of the special facts which were developed at conferences with representatives of the industry, it is our opinion that the practice of computing working time on a 'face to face' basis in the bituminous coal industry would not be unreasonable."

Promptly thereafter, Col. Fleming issued a public statement on July 27, 1940, in which he said in part:

> "In view of the circumstances described by the industry in submitting its inquiry, Colonel Fleming announced that the practice of computing working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable. Colonel Fleming explained the term 'face to face' to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the place of work and the time spent in returning from the working place to the portal in the evening."

The Monroe Coal Mining Company case was then closed, and it was thus administratively determined that the provisions of the Fair Labor Standards Act did not require the inclusion of travel time in the work week of the underground employees in the bituminous coal mining industry.

The United Mine Workers Union has never in any way contended that travel time was work time under the Fair Labor Standards Act until the Wage Conference of March, 1943, and only contended for it then as an additional basis for its demand for a general wage increase to all mine workers, both inside and outside the mines. The 1943 demand of the Union, under the heading "Hours of Labor", for travel time, is as follows:

> "To conform with the basic and legal requirement for the industry, the maximum hours and working time provisions be amended to establish portal to portal for starting and quitting time for all underground workers."

[fol. 750] The succeeding demand, under the heading "Wage Rate Increases", calls for a two dollar a day flat wage increase "for all classifications of inside and outside day men", and equivalent increases for piece workers, and provides:

> "The increased rates include compensation to meet the portal to portal starting and quitting time."

Thus, the 1943 demand of the Union is actually a demand for a flat wage increase to all mine workers, whether or not

they spend any time traveling underground to their usual places of work, and not truly a contention that the Fair Labor Standards Act requires inclusion of the actual travel time as work time for those who have actual travel time underground.

CONCLUSIONS OF LAW

The crucial question which I now have for determination, as set out in the pretrial order, briefly stated, is whether or not the time spent by plaintiff's underground employees in being transported or walking from the portals of the mines to and from their usual working places, constitutes working time which must be included in the work week of plaintiff's underground employees by reason of the Fair Labor Standards Act of 1938.

The pertinent portions of the Act are as follows:

"Section 7:

"(a) No employer shall * * * employ any of his employees who is engaged in commerce or in the production of goods for commerce— * * *

"(3) for a work week longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified, at a rate not less than one and one-half times the regular rate at which he is employed."

"Section 3:

"(g) 'Employ' includes to suffer or permit to work."

It will be readily conceded by all, that travel by employees from the portal to their places of work and return, is not for the pleasure, relaxation or amusement of the employees, but it is to be carefully noted that the question is not [fol. 751] whether it would be fair for the employer to pay employees for this travel time, or whether I think the employees should be paid for travel time; the real question is whether the language of the Act *requires* such payment. The language of the Act certainly does not in definite terms cover the question here presented. So it would seem advisable to look into the legislative history of the Act.

Legislative-History of the Act.

I can neither find, nor has anything been pointed out to me, in the legislative history of the Fair Labor Standards

Act of 1938, which indicates that it was the intent of Congress to make so radical a change in the wage structure in the bituminous coal industry as to require payment for underground travel time. It is idle to say that, because employees in other industries are compensated under the Act for travel time under various and diverse conditions and circumstances, underground employees in the bituminous coal industry under and by virtue of the Act, must be paid for travel time. Circumstances alter cases. Under some circumstances, travel time is work time: under other circumstances it is not. The bituminous coal industry is *sui generis*. Its problems have been before Congress for many years. It is one of the few industries, for the regulation of which special Acts of Congress have been passed such as the two Guffey Acts. It is a highly competitive industry. Not only is there competition between the individual coal operators: there is competition between the northern operators and the southern operators, and always there is the sharpest kind of competition between the producers of bituminous coal and the producers of other fuels such as oil and gas. These conditions and many others are important factors which must be regarded in making up a wage structure for the bituminous coal industry. And in this industry, the wage structure is of peculiar importance because the cost of labor makes up approximately two-thirds of the cost of the production of coal. Of course, the Fair Labor Standards Act applies to the bituminous coal industry, as it applies to all interstate industry, but in situations not precisely covered by the language of the Act, its legislative [fol. 752] history, as well as all the facts and circumstances, should be examined.

The first general regulation of wage and hour standards for private employment was embodied in the National Industrial Recovery Act. In the Bituminous Coal Code, adopted under the NIRA in 1933, travel time was definitely excluded, and the "face to face" basis was adopted by the following language:

> "No employee shall be required or permitted to work more than eight hours in any one day *at the usual working places* * * *" (Italics mine).

Similarly, in the 1934 amendment, it was provided that:

> "Seven hours of labor shall constitute a day's work, and this means seven hours' work *at the usual working*

places for all classes of labor, exclusive of the lunch period, whether they be paid on the day or the tonnage or other piece-work basis; * * *" (Italics mine).

This Code remained in effect until 1935, when the National Industrial Recovery Act was held unconstitutional.

In 1937, fair labor standards bills were introduced in both Houses of Congress, and extensive committee hearings were held on these bills. Mr. John L. Lewis, President of the United Mine Workers of America, testified at length, and at no time indicated that travel time should be included as work time. On the contrary, he indicated that he did not expect the bill to affect the coal industry. The following excerpts are from his testimony:

"Senator LaFollette. * * * As I understand it, the objective of this bill as outlined in Section 23, one of them is to prevent the board from going in and upsetting collective bargaining agreements or entering the field where collective bargaining is actually functioning in a bona-fide manner, and thereby producing the result of the action of the employer and employee represented by genuine and effective labor organization." (Page 280).

"Mr. Lewis. * * * For instance, frankly I would not want this bill to convey power to a board to order an investigation into all of the wage agreements in the mining industry right now, or to give the board power to decide that the collective-bargaining agreements in the mining industry were not sound, not proper, were confiscatory, or not in harmony with the facts of the industry and order a modification thereof. I think the power of the board should be limited to cases which run below the level of the standards fixed by Congress. I see endless confusion in the adoption of section 5 now. I see a drift toward the complete fixation of wages in all industry by governmental action." (Page 281).

"Senator Holt. Would you favor allowing the board to investigate collective bargaining agreements where the collective bargaining agreement was beyond the wage level?

"Mr. Lewis. No; I see no point in it.

[fol. 753] "Senator Holt. If they have a right to investigate collective bargaining agreements below the

wage level why should not they have the right to investigate collective bargaining agreements above the wage level?

"Mr. Lewis. Merely because their right of investigation of agreements that were substandard would be for the purpose of ascertaining whether that was so and of modifying them to meet the congressional standards." (Page 297).

Excerpts from "Joint Hearings Before the Committee on Education and Labor, United States Senate, and the Committee on Labor, House of Representatives, June 2-22, 1937."

In its report on an amended bill in the nature of a substitute, the Senate Committee on July 6, 1937, said:

"The right of individual or collective employees to bargain with their employers concerning wages and hours is recognized and encouraged by this bill. It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-work hour industrial workers who are the helpless victims of their own bargaining weakness that this bill seeks to assist to obtain a minimum wage."

(Senate Report No. 884, 75th Cong.)

During the debates on the bill, numerous statements were made indicating that it was not the intent of Congress to interfere with the process of collective bargaining. The following are of interest:

"Mr. Walsh. Next, does the bill affect collective bargaining agreements already made or hereafter to be made between employer and employee?

"Mr. Black. It does not". (Senate, July 27, 1937. Congressional Record, Vol. 81, p. 7650.)

"Mrs. Norton. * * * It is not the intention of this amendment, or of the bill, to start fixing wages in all industries but only in those in which oppressive wages are being paid to a substantial portion of workers * * *" (House, December 13, 1937, Congressional Record, Vol. 82, p. 1391.)

"Mr. Randolph. * * * It (the bill) is not concerned with that fortunate majority of the laboring classes whose collective bargaining power is sufficiently potent to insure the preservation of their industrial rights.

"But it is concerned with those millions in industry who are unprotected and unorganized. * * *" (House, December 13, 1937, Congressional Record, Vol. 82, p. 1395: Parenthesis supplied.).

[fol. 754] "Mr. Curley. * * * There is no conflict of jurisdiction under the provisions of this fair standards of labor bill, and the existing labor organizations of this country. The bill concerns only of relieving the paralysis which, at present, shackles misery and poverty to millions of heads of families, who are underpaid and causing a colossal financial loss in purchasing power because of existing deplorable conditions." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7283.)

"Mr. Boileau. * * * What is more, we are preserving for organized labor its right to bargain collectively and it will bargain for a higher wage than that." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7290.)

"Mr. Allen. * * * This bill has a threefold purpose as I see it. First, it eliminates sweat shops * * *. The bill does not affect organized labor, but those 5,000,000 American working men and women who have not yet been benefited by organized labor." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7291.)

"Mr. Fitzgerald. * * * I would have you observe that this proposed legislation will not improve the wages and hours of the majority of workers, nor does it attempt to. For I am greatly pleased to say that the majority of workers do not need this legislation because they are receiving a living wage and are not forced to work unreasonable hours." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7310.)

Although the above statements were made at various times while the measure was being amended and revised, and therefore not with respect to the Bill in its final form, they show a continuing intention not to interfere with the processes of collective bargaining.

No such statute was enacted in 1937, and in regard to wage and hour legislation, in his message delivered on January 3, 1938, the President said:

> "We are seeking of course, only legislation to end starvation wages and intolerable hours; more desirable wages are and should continue to be the product of collective bargaining." (Congressional Record, Vol. 83, p. 9.)

Shortly before the passage of the Fair Labor Standards Act of 1938, Congressman Connery, on- of its patrons, said of it:

> "The thing to remember about this bill is that it is not designed to be a cure-all for industrial wages. It is merely aimed at wiping out sweatshop conditions and child labor. Those are tha two salient features and should be kept in mind." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7322.).

Thus, it seems to me clear that it was neither the intent of Congress nor the desire of the Union, in the enactment of the Fair Labor Standards Act of 1938, to interfere in any [fol. 755] way with the wage structure of the bituminous coal industry. A statement made by Major Percy Tetlow, an official of the International Union, United Mine Workers of America, who testified in this case, seems to bear out this conclusion. He said:

> "No, the miners' organization has always taken the position that the question of wages, hours and conditions of employment should be governed and controlled by agreements under collective bargaining in the industry more so than by legislation. We have always taken the position that any legislation which will improve standards of working men and women,—to favor it and foster it and support it. Fundamentally, we are opposed to legislation that controls the daily wage and conditions of employment. We think that is a relationship that should exist between employer and employee."

The Administrative Ruling

The fact that the precise question here presented has been investigated and ruled upon by the governmental ad-

ministrative agency charged with the enforcement of the Act, seems to me to be of paramount importance.

The evidence in this case shows beyond question that in July 1940 the Administrator of the Wage and Hour Division, Department of Labor, ruled that travel time of underground workers in the bituminous coal industry was not work time within the purview of the Fair Labor Standards Act. There is no suggestion that there has been any modification of this ruling. The Administrator was invited by plaintiff to intervene in this action, of which invitation he must have been aware, as his Regional Attorney was present in court throughout the trial and also attended the pretrial conference. I must therefore assume that the Administrator did not wish to retract or modify his ruling of July 1940.

Of course, an administrative ruling does not have the force of law. In one instance, where I was satisfied that an administrative ruling was plainly wrong, I declined to follow it. *Magann* v. *Long's Baggage Transfer Co.*, 29 F. Supp. 742. However, as to such rulings, the Supreme Court [fol. 756] has said:

> "In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involved 'contemporaneous constructions of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'."
>
> *United States* v. *American Trucking Associations*, 310 U. S. 534, 549.

> "* * *, it has been the settled law that when uncertainty or ambiguity, such as we have here, is found in a statute, great weight will be given to the contemporaneous construction by Department officials, who were called upon to act under the law and carry its provisions into effect, * * *."

National Lead Co. v. *United States*, 252 U. S. 140, 145. See also *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, *Securities Exchange Commission* v. *Associated Gas & Electric Co.*, 99 F. (2d) 795, 798; *Butte Miners Union* v. *Anaconda Copper Mining Co.*, 112 Mon. 372, 118 P. (2d) 148.

Consequently, I have generally followed such rulings. *Reliance Storage and Inspection Co., Inc.* v. *Hubbard*, 50 F. Supp. 1012, 1014.

It seems to me that this particular administrative ruling is entitled to even more than the "great weight" to which the Supreme Court said such rulings were entitled generally, by reason of the thoroughness with which the Administrator went into the question before making his ruling. It appears from the evidence that the question first came to the attention of the coal operators through what was probably a routine investigation of the operating practices of the Monroe Coal Mining Corporation in Pennsylvania, made by a representative of the Wage and Hour Division to determine whether or not this company was complying with the Act. After a thorough investigation, this investigator reported that in his opinion, travel time in the bituminous coal industry would not be considered as work time, but that, as travel time had been counted as work time in metal mining in the consent decree entered in the *Cornucopia Gold Mining* case, possibly it would be necessary to count travel time as work time in the bituminous coal mining industry. Upon learning of this situation, high officials of the coal operators associations took the matter up with the presi- [fol. 757] dent and high officials of the United Mine Workers of America, who all agreed, apparently without dissent, that the Act did not require the inclusion of travel time as work time, and that the administrator should so rule. Representatives of the operators and of the Union expressed this view to various representatives of the Wage and Hour Division, and finally to the Administrator, Colonel Fleming himself. Colonel Fleming "indicated that if in this long period of collective bargaining in the mining industry that that (the face-to-face basis) was the basis upon which payment for work was agreed upon, that there wasn't any reason why he should wish to disturb it. He said that he felt that a *bona fide* arrangement of that kind of history of fifty years, certainly ought not to be disturbed, particularly after the description we had given him of the disturbance that would be occasioned in the industry by any such revolutionary change in its wage structure." However, Colonel Fleming did not then make a ruling, but referred the representatives of the operators and the Union to the Regional Director of the Office of the Wage and Hour Division in Philadelphia and his attorney. After conferring

with these officials, the representatives of the coal operators and the Union wrote and delivered the letter of July 9, 1940, quoted from in my findings of fact, and which is generally referred to as the "Houck letter." Then, after receiving a report of this conference, Colonel Fleming made and announced the administrative ruling that in the bituminous coal industry, the Fair Labor Standards Act did not require the inclusion of travel time of underground workers as work time.

I do not find anything in this record which satisfies me that this ruling was plainly wrong: in fact, I find nothing which casts doubt upon its correctness. Giving to it the "great weight" to which the Supreme Court has said it is entitled, it is my conclusion to follow and sustain this ruling.

[fol. 758] *Case of Tennessee &c. v. Muscoda &c.*

Defendants principally rely upon the case of *Tennessee Coal, Iron & Railroad Co. et als.* v. *Muscoda Local No. 123, et als.*, (5th Circ.), District Court, 40 F. Supp. 4, Circuit Court, 135 F. (2d) 320, and on rehearing, 137 F. (2d) 176. This also was a declaratory judgment action, for the determination of what constituted the work week of underground iron ore miners under the provisions of the Fair Labor Standards Act of 1938. The District Court considered separately whether—

(1) The time spent on the surface in obtaining and returning tools and equipment,

(2) travel time from the portal to and from the usual places of work, and

(3) the lunch period,—

constituted working time within the meaning of the Act, and concluded that (1) the time spent on the surface in obtaining and returning tools and equipment, and (2) travel time from the portal to and from the usual places of work, must, under the Act, be included in the employee's work week, and that (3), the lunch period, did not constitute working time and need not be included in the work week.

On appeal, the Circuit Court (one judge dissenting) affirmed as to (2) and (3), but reversed as to (1).

At the outset, it is interesting to note that the majority of the Circuit Court, especially in the opinion on rehearing,

strictly confine their holding to the particular circumstances of that instant case, and that the majority holding was merely a refusal, "because not clearly erroneous, to set aside a finding supported by evidence as to what constituted working time of employees in the particular circumstances." (p. 183.) The Court said (p. 183):

"In a supplemental brief, one of the appellants says that the effect of our decision, the plain and definite holding of the majority, is that as a matter of law the time consumed in traveling from the portal of the mine to the face and in returning therefrom to the portal 'must be included in the working time that makes up the work-week of every ore-mining employee within the meaning of Section 7 of the Fair Labor Standards Act.' We did not so hold, and such should not be the effect of our decision.

[fol. 759] "We have written in vain if our opinion is to be interpreted as providing a rigid definition of working time, or as upholding the portal-to-portal theory as a matter of law, or as denying the principle that *in close cases it is well to afford the fullest possible scope to agreements among the individuals who are actually affected.* The evidentiary value of such agreements in relation to working time is for the jury or other factfinding tribunal. We have expounded no rigid definition of working time.

"The Act fails to provide one, and we should not do what was deemed unwise to do by legislation. The Congress probably failed to define working time for the same reason that it refrained from attempting to define the regular rate of pay, namely, 'because the employment relationships to which the Act would apply were so various and unpredictable'.

"Appellants sought by declaratory judgment to obtain a rigid definition of working time favorable to them. They now chide us for laying down such a definition against them. We do not do either; *we merely refused, because not clearly erroneous, to set aside a finding supported by evidence as to what constituted working time of employees in the particular circumstances.* The Act of Congress in this respect differs from the legislation of those mining states that limit worktime in underground mines to eight hours per day

and that include in this reckoning all time spent underground." (Italics mine).

Defendants do not here contend that lunch time is working time. They do contend that working time for the underground employees begins as soon as they are required to and do report at the portal, and continues until they return to the portal at the end of the shift, thus including all the time spent in obtaining lamps, tools or equipment, and other preparatory activities, as well as travel time.

As to the time spent in preparatory activities, estimated to consume here from three to ten minutes, I agreed with the majority holding in the *Tennessee* v. *Muscoda* case, *supra*, which is there set out as follows at page 323:

> "With respect to time spent by employees checking in and out and procuring and returning tools, lamps, and carbide, the case stands differently. It apears that the workers were obliged to furnish their own tools, lamps, and carbide, and were free to exercise their own judgment as to when, where, and how they should procure their equipment. The company merely instructed them as to the equipment needed, and did not attempt further to regulate the matter. The checking system used by appellants required the employees only to deposit a metal disc at the tally house when arriving for work, and to pick it up again at the end of the shift. In addition to the practical difficulties incident to the computation of isolated moments so elusive in character, we think these pursuits should not be computed as work-time, since they fall within the category of duties incident to qualifying the employee to perform his work rather than within the scope of his actual employment."

[fol. 760] As to travel time, I do not agree that the majority holding in the *Tennessee* v. *Muscoda* case, supra, should be applied here, as contended by counsel for defendants. In the first place, the weight of the *Tennessee* v. *Muscoda* case, supra, is considerably lessened by strong dissent of Sibley, Senior Circuit Judge, in which, in part, he said:

> "'The Act does not define 'work time' or even 'work'. It may apply to each and every industry. What would be work in one industry may not be in another. It

seems to me that a man is at work, for the purposes of the Act, when he is doing what he is hired to do. It may involve mental or physical effort, or it may consist in simple presence. It all depends on the contract of hiring. The Act did not intend to upset and nullify the wage contracts of force in the various industries. It simply fixed minimum wages for work done under them, and maximum hours. Of course, contracts yield to the Act on these points, but they still control as to the work to be done, and the way it is to be done, and as to the scale of pay if not less than the minimum fixed by the Act. These things are left to bargaining, and especially to collective bargaining under the principles of the National Labor Relations Act, 29 U. S. C. A., Sec. 151 et seq.

"No question is older in such bargaining than the question whether 'travel time' is to be included in 'work time'. The worker has always thought he ought not to lose all of the time necessary to go to and from his place of work; the employer has thought he ought not to pay for time that produces no work results. The dispute has been resolved in various ways in employment contracts for pay estimated by the hour. Plumbers demand and get pay from the time they leave their places of business to go to a job until they return. Railroad trainmen get pay from the time they report for duty, no matter what delay may occur in the starting of the train. Railway trackmen also are paid from the hour of their assembly at the section point, though they may ride their motor car for miles before doing any track work. On the other hand, carpenters, masons and most artizans and laborers are paid for work only after they take up their tools on the job. As to coal and iron ore miners, traditionally they have been paid according to production, but their modern contracts have always included an express agreement as to their work time, and that agreement has excluded from work time the travel time in reaching the coal seam or ore bed, which were agreed to be the place of work. This is true of the collective bargains made by strong unions throughout the Appalachian region, as it is true of the bargains under which the miners in this case have worked. Their work time is agreed to be that spent at the ore bed. The employers' arrangement to get them

to that place reliably and safely is primarily for the benefit of the miner and is not work for the employer, according to these agreements. The discomforts and dangers of the trip, as well as the loss of time, are all considered in fixing the rate of pay for the work of extracting the ore, and the pay scales here involved are [fol. 761] far above the minimum fixed by the Act. The miner's work is hard and dangerous, but his pay is supposed to compensate for all this. If it would be better to include travel time in work time, it ought to be done by a new bargain in which rates of pay are also reviewed. If the change is to be by a special statute (some western States have such statutes), it will operate justly in future, and not by unexpected penalty, as here.

"There is nothing in the Act to outlaw agreements that travel time in getting to or from the agreed place of work is not work time. This is true though the employer may organize a means of transportation and make rules for its use. The agreements here that work time includes only time at the face of the ore bed are not illegal. Digging out the ore is what the miners agree to do, and for that they are paid. Getting their tools together and riding or walking to the agreed place of work is not, by force of any law work done for the mine owner. No one, I suppose, would say that if a group of miners who had spent an hour riding to work decided of their own will not to dig any ore and spent another hour riding back, they had done any work for which they should be paid by force of the Act."

However, conceding the correctness of the decision of the majority in the *Tennessee* v. *Muscoda* case, it seems to me that this decision is clearly distinguishable from the instant case and not in point here. In deciding the issue as to travel time, the District Court in its conclusions, and the Circuit Court on appeal, relied upon certain control-ing considerations.

First, there it appeared that the Administrator of the Wage and Hour Division, United States Department of Labor, had recently ruled that in the metal mining industry, travel time was work time, and furthermore, the Administrator there intervened and made substantially the same contentions as did the several defendants. Here, the situa-

tion is precisely the converse. In July, 1940, the Administrator announced his ruling that in the bituminous coal industry, travel time was not necessarily work time under the Act, and there has been no subsequent modification of this ruling. And as has been heretofore mentioned, although plaintiff in its complaint asserted that the Administrator was interested in the construction and application of the Act and invited his timely intervention in this action, the Administrator has neither sought to intervene nor appear as an *amicus curiae*, although his Regional Attorney was in attendance throughout.

Second, there it did not appear to the satisfaction of the court that by established usage throughout the industry, travel time was uniformly excluded from the work week. It does appear here, beyond any question, that travel time [fol. 762] has never been considered as, or included in, work time by anyone in the bituminous coal industry in this country. On the contrary, for certainly the past fifty years, the "face to face" basis has been universally recognized in the bituminous coal industry as the basis for computation of work time.

Third, there, the court concluded that, although it be conceded that recent wage contracts did exclude travel time from the work week, such contracts were not free and uncoerced agreements on the part of the mine workers, but reflected the dictation of the employers and the inability of the employees and their union to obtain recognition of their right, as repeatedly asserted and contended for, to be paid for their underground travel time. Here, we have the word of both the operators and the Union that as to the "face to face" basis, "This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years, and is the result of collective bargaining in its complete sense." On this point, an excerpt from the brief of counsel for the iron miners in the *Tennessee* v. *Muscoda* case, on appeal, is quite interesting (p. 59).

> "We are not trying the case of coal miners. We are not experts on coal mining. We do know that there are two great differences between the coal mining situation and the mining of iron ore in Jefferson County. *In coal mining we find a union which has been strong and*

powerful and which as a union has been engaged in collective bargaining with the coal operators over a long period of years. In our case we find the efforts of the men to organize their union presents a pitiable picture of helplessness against the domination of the mining companies. In coal mining the men work seven hours per day. At no point in the voluminous record created by the appellants do we find a single ore mining company offering to pay its men on a seven hour day." (Italics mine).

The record in this case by no means discloses "a pitiable picture of helplessness against the domination of the mining companies". On the contrary, the record here does disclose the picture of the "strong and powerful" union mentioned by counsel, which is able and willing, when it feels aggrieved, even in time of war, to paralyze the production of bituminous coal in this country by a strike or, in the euphemistic language of its members, "a work stoppage while awaiting a contract". It is hardly likely that such an union has been [fol. 763] coerced by the coal operators into waiving any valuable monetary right to which its members were entitled by law.

Fourth, there the court found that the underground travel was under conditions peculiar to the mining of iron ore which were replete with hazards, highly uncomfortable and requiring physical exertion, due largely to overcrowding of cars, and which were unpleasant and disagreeable because of bad odors, heat and poor ventilation, and were burdensome to those encountering them. Here, although I have not found that the "man-trips" constituted pleasure excursions, I have found no such painful and burdensome conditions as those described in the iron ore mines.

For the reasons set out above, it appears to me that the *Tennessee* v. *Muscoda* case is clearly distinguishable from the instant case, and should not govern, conceding that the *Tennessee* v. *Muscoda* case was correctly decided by the majority.

Other cases involving the question of travel time in other industries under various circumstances and in the light of various statutes have been cited and discussed by counsel for both sides. It does not seem to me that they are suffici-

ently pertinent to the particular situation here presented, to warrant a discussion of them herein.

Contemporaneous Construction and Agreements by the Parties

The proposition, that contracts made in violation of the Fair Labor Standards Act, or any other valid Act of Congress, are ineffective as against the Act, is too plain to require the citation of authority. And it is equally true that custom and usage, no matter of what long standing, cannot prevail against an Act of Congress. As well stated by counsel for defendants here, acts of Congress are frequently designed to change customs and usages which are deemed unfair, harsh or oppressive. Nor can contemporaneous understanding or constructions of the act by the interested parties alter its plain terms.

However, in this case, the plain terms of the Act do not cover the precise situation here presented. The question of when travel time is work time, and when it is not, is a question which may require a diversity of answers in diverse [fol. 764] situations, as pointed out by Judge Sibley in the *Tennessee* v. *Muscoda* case, *supra*, at page 323 thereof. It is quite true, as urged by defendants' counsel, that that which is plain requires no interpretation and presents no occasion for the use of extrinsic aids to its construction, but I cannot agree with their contention that the plain language of the Fair Labor Standards Act requires inclusion of travel time as work time. It seems to me that the language of the Act relied upon by defendants *quoad* travel time, falls far short of sustaining their contention in plain terms. In such a situation, it seems to me some of the very cases cited and relied upon by defendants' counsel recognize the principle that extrinsic aid should be sought.

> "Long continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute, but cannot alter provisions that are clear and explicit when related to the facts disclosed."
>
> *Louisville & Nashville &c. Co.* v. *United States*, 282 U. S. 740, 759.

> "The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible

upon its face of two constructions, the court may look into prior and contemporaneous acts, the reason which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction, but where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it."

Hamilton v. *Rathbone*, 175 U. S. 414, 419.

In this case, more than 400 employees travel from their homes to the mines in trucks and buses operated by the company. If they are entitled to pay for the time spent in traveling from the portal of the mine to their usual places of work, might it not also be contended that they are entitled to pay for the time spent in travel from the points where they board the trucks and buses to the mines? If "surrender of freedom of action" be any criterion, as contended by defendants' counsel, do not these employees surrender their "freedom of action" when they become passengers on plaintiff's vehicles?

It does therefore seem important to inquire into the customs and usages of this industry, the contracts and agreements made between the parties, and the contemporaneous construction placed upon the Act by the interested parties. The evidence shows beyond question that, in the bituminous [fol. 765] coal industry in this country, for the past fifty years, travel time of underground workers has not been considered work time. By the NIRA Code for the bituminous coal industry, travel time was definitely excluded from work time. By the precise terms of all subsequent contracts between plaintiff and defendants, and between employers and employees generally in the bituminous coal industry, travel time has been excluded from work time.

But the defendants contend that the last contract expired March 31, 1943, and that thereafter, in the absence of contract, the Fair Labor Standards Act applied, and that by virtue thereof travel time became work time. Defendants, by an amended answer, have disclaimed any compensation for overtime prior to April 1, 1943. Plaintiff contends that the contract, which by its terms was to expire March 31, 1943, was continued in force by the parties pursuant to directives of governmental agencies. Certainly,

the parties continued to operate under the contract of April 1, 1943, to the time of the institution of this action. However, it seems to me that the question of whether or not this contract was continued in force and remained binding upon the parties during this period, is neither important nor material. If the Fair Labor Standards Act, from its effective date, required the inclusion of travel time as work time, it did so irrespective of contract, and if there was a contract to the contrary, the contract would be ineffective as against the Act.

What does seem to me important and controlling is that by the universal custom and usage of the past fifty years, and by agreement of the parties in every collective bargaining agreement which was ever made, it was universally recognized that in the bituminous coal industry, travel time was not work time. And this is the condition which prevailed when the Fair Labor Standards Act was enacted in 1938, and of which it must be presumed Congress was aware.

> "It is now a settled principle of statutory construction that Congress or a Legislature, in legislating with regard to an industry or activity, must be regarded as having had in mind the actual conditions to which the act will apply; that is, the needs and usages of such activity."
>
> *United States* v. *Turner Terpentine Co.*, 111 F. (2d) 400, 404.

> [fol. 766] "Usages long established and followed, have, to a great extent, the efficacy of law in all countries. they control the construction and qualify and limit the force of positive enactments."
>
> *Slidell* v. *Grandjean*, 111 U. S. 412, 421.

The contemporaneous construction of the Act by the interested parties in the bituminous coal industry could not possibly appear more clearly nor fully than as set out in the letter of July 9, 1940, written to the Administrator by responsible representatives of the coal operators and the United Mine Workers jointly, and usually referred to as the "Houck letter". In this letter, not only is there no suggestion that by the terms of the Fair Labor Standards Act, travel time must be included in working time; on the contrary, it is positively asserted that any change from

the traditional "face to face" basis would "result in complete chaos, and would probably result in a complete stoppage of work at pratically all the coal mines in the United States"; and "moreover", that *"the very purpose of the Fair Labor Standards Act would be defeated"* by such a change.

This entire letter is so illuminating that I append it *in extenso* as a foot note hereto. [*1]

> "Presumably, Congress refrained from attempting such a definition because the employment relationships to which the acts would apply were so various and unpredictable. And that which is was unwise for Congress to do, this Court should not do. When employer and employee have agreed upon an arrangement which has proved mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text. * * * "
>
> *Walling* v. *Belo &c.*, 316 U. S. 624, 634. (Italics mine).

CONCLUSIONS

For the reasons set out above, my conclusions of law are:

(1) That the Fair Labor Standards Act of 1938 does not require that there be included within the work week of underground workers in plaintiff's mines, either time spent by such employees outside the portal of the mines before entering therein, or time spent in traveling from the portals [fol. 767] to their usual places of work and return.

(2) That plaintiff, in computing the work week of its underground employees on the basis of hours of work in the mines at their usual working places, exclusive of the lunch period, and the time spent outside the portals and travel time from the portals to their usual working places and return, as provided in the effective wage agreements and continuations thereof, and in paying its underground workers for their services on that basis, has complied with and discharged all its obligations imposed upon it by the Fair Labor Standards Act of 1938.

An order will be entered declaring the rights of the parties in accordance with the above conclusions, and dismissing this action at the costs of the defendants.

(S.) A. D. Barksdale, United States District Judge.

[fol. 768] *Foot Note No. 1

1617 Pennsylvania Boulevard
Philadelphia, Pennsylvania,
July 9, 1940.

Col. Philip B. Fleming, Administrator, Wage and Hour Division, Department of Labor, Washington, D. C.

DEAR MR. ADMINISTRATOR:

As a result of certain investigations which have been conducted by the Wage & Hour Division at bituminous coal mines in Pennsylvania, particularly at the Revloc shaft of the Monroe Coal Mining Company, and a conference that has been held by your Supervising Inspector, Mr. Caffey, at Pittsburgh, Pa., with a committee of the Western Pennsylvania Coal Operators' Association, concerning the application of the Fair Labor Standards Act to the bituminous coal mining industry, certain questions have arisen that are disturbing to both employers and employees within the industry. These uncertainties have been continuing for some time and are causing much concern to the mine workers and the mine operators, especially with reference to "travel time".

Today, the Negotiating Committee of the Appalachian Wage Conference, namely: Messrs. J. D. A. Morrow, President of Pittsburgh Coal Company; L. T. Putnam of the Raleigh Wyoming Mining Company, Beckley, W. Va.; L. C. Gunter, of the Southern Appalachian Coal Operators' Association, Knoxville, Tenn.; Charles O'Neill, President of the United Eastern Coal Sales Corporation, New York City; C. E. Cowan, Vice President of Monroe Coal Mining Company; Frederick H. Knight, counsel for Monroe Coal Mining Company. W. L. Robison, President of the Youghiogheny & Ohio Coal Company and Chairman of the Appalachian Wage Conference on the one hand, and Mr. Earl E. Houck, Director of the Legal Department of the United Mine Workers of America, met with Mr. Dorsey, Regional Director, Philadelphia, Pa., and Mr. Gallagher, Regional Counsel, Philadelphia, Pa., at which time these questions were discussed at length, particularly the application of the Act as to the question of hours of work in the bituminous coal industry.

The mine workers and the mine operators present presented their views to representatives of the Wage and Hour

Division as to the provisions of the Appalachian Wage Agreement covering maximum hours and working time. We have filed with the Division copy of the Appalachian Wage Agreement, and the entire provision as to maximum hours and working time is included therein. The pertinent language, however, is "Seven hours of labor shall constitute a day's work. The seven-hour day means seven hours' work in the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis * * *." The Appalachian Wage Agreement is the basic agreement for the bituminous mines in the States of Pennsylvania, Ohio, West Virginia, Virginia, Eastern Kentucky, Southeastern Tennessee and Maryland. In this territory there are several thousand rail shipping mines employing from 300,000 to 325,000 men, and some twenty-three operating districts. Each of the districts work out a local wage agreement covering its own territory, subject, however, to the provision that it must include within it all of the provisions of the Appalachian Agreement. The mines in the Appalachian region produce 70% of the total bituminous coal produced in the United States annually. Also, the Appalachian Agreement is used by the United Mine Workers of America as the basic agreement upon which the district agreements of the remaining 30% of the country is predicated.

[fol. 769] The United Mine Workers of America and coal operators of the United States have been negotiating wage agreements for a period of fifty years. The Appalachian Agreement, covering as it does a great number of men and mines, has been worked out over that period of time and covers within its general provisions myriad wage rates, conditions of work, and hours of employment. This agreement, with its twenty-three supplemental agreements, constitutes a whole document. In those conferences, of course, hours of work has been one of the principal matters of consideration during this period of time. Hours of work with wage rates constitute the heart of any such agreement. In this basic industry we have provided for seven-hour days, five-day weeks, thirty-five hours per week, with high rates of pay. The basic inside day rate in the North is $.857 per hour, and in the South it is $ .80 per hour. The underground workers are paid on this basis with maximum rates for mobile loading machine operators, approximately $1.09 per hour. In addition, the agreement provides, "work by

mine workers paid by hour or day in excess of seven hours in one day, or thirty-five hours in any one week, shall be paid for it at the rate of time and one-half * * *." It is our opinion that these substantive provisions of the agreement are among the highest standards of labor provided in any industry in the United States, both as to hours of working time and as to wages paid. There is full and complete understanding in the industry between employer and employees as to the application of these provisions. This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years and is the result of collective bargaining in its complete sense.

There are many reasons why the provision as to working time has been set out as provided by this agreement. The impracticability of measuring time by any other method is inherent in the very nature of mining coal. Coal mines are sometimes very extensive. When they are first opened up, the working places are, of course, close by and near to the opening of the mine. In such cases there is no problem of either transportation of the men, to the working places or time consumed in reaching them; but as mines grow older, the working places move farther and farther away from the portal or opening of the mine, and as such conditions develop, it becomes necessary for provision to be made for transportation of the men over long distances to their working places. This is usually provided by what is known in the industry as "man trips." These trips are scheduled to leave the outside or opening of the mine at a certain hour, so that all the employees will reach their working places by the hour at which work regularly begins at the working places throughout the mine, and these trips are also scheduled to leave the inside of the mine when the day's work is done, at the conclusion of the seven-hour period of work at the working places. Among other provisions of the agreement, there is provided a time for starting the day's work and a lunch period, as well as a time for expiration of the work day. There is some variation in this, depending upon local conditions as to the starting and quitting time at the various collieries. The agreement provides for a certain tolerance. In any event, the starting and quitting time are no more than seven hours apart, exclusive of the lunch period.

In the many conferences that have been held over this period of fifty years, naturally all manner of suggestions and proposals for amplification or amendment of the agreement has been made both by the mine workers and the operators.

The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual working place. Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898.

[fol. 770] It is urged that any ruling requiring such a change in the custom, tradition and contract provision so as to change the work day from "seven hours' work in the mines at the usual working places" to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated. In such an event, it would make necessary the reassembling of the Appalachian Joint Wage Conference and it would be faced with an issue that would be almost impossible of solution by agreement, resulting in an industrial conflict that could paralyze the nation. This would be a most unhappy result to flow from an act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and the high rates of pay in the bituminous coal mines. The great amount of money involved in the case of extra payment by the operators or the great changes that would be required in the rates of pay to the miners, should any

change in the present contract be necessary by reason of a new standard for the measurement of time worked, is so serious that a negotiated adjustment would seem to be impossible.

For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, and the definition of working time, as set forth in the Appalachian Agreement (which embodies the custom and traditions of the bituminous mining industry), as complying both with the provisions of the Fair Labor Standards Act and of Interpretive Bulletin No. 13, to the effect that "reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act."

We therefore respectfully request that your Division issue a supplement to interpretive Bulletin No. 13, stating that the standard of wages and hours of work, and definition of working time, set forth in the Appalachian Agreement, entered into on May 12, 1940, between twenty-three district associations of bituminous coal operators comprising the Appalachian coal producing area and the International Union, United Mine Workers of America, and the several district agreements based thereon, conform to and satisfy the requirements of the Wage & Hour Act.

Respectfully submitted, For the United Mine Workers of America: (S.) Earl E. Houck, Director of the Legal Department. For the Operators: (S.) W. L. Robison, Chairman; (S.) Charles O'Neill, (S.) L. T. Putnam, (S.) L. C. Gunter, (S.) J. D. A. Morrow, Appalachian Joint Conference Negotiating Committee.

[fol. 771] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

Civil No. 73

JEWELL RIDGE COAL CORPORATION, a Corporation, Plaintiff,

v.

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, an unincorporated association, affiliated with the International Union, United Mine Workers of America; Harland Hampton, President, John A. White, Vice President, Omer Ketron, Recording Secretary, James W. Belcher, Financial Secretary, C. M. Mathena, Treasurer, Tony Farnese, Door Keeper, Individually and as Officers of said Local No. 6167; Carl Altizer, Omer Ketron and T. V. White, Individually and as Members of the Mine Committee of said Local No. 6167; H. D. Hampton, Tony Farnese, and James Al Smith, Individually and as members of the Safety Committee of said Local No. 6167; Local No. 7327, United Mine Workers of America, an unincorporated association, affiliated with the International Union United Mine Workers of America; J. H. Sheppard, President, J. E. Collins, Vice-President, Forrest Ritchie, Recording Secretary, Josh Keen, Financial Secretary, C. F. Clark, Treasurer, Lyss Patrick, Door Keeper, Individually and as Officers of said Local No. 7327; Josh Keen, J. A. White, and Paul Sykes, Individually and as Members of the Mine Committee of said Local No. 7327; Walter Jackson, J. S. Walker and Glenn Crouse, Individually and as Members of the Safety Committee of said Local No. 7327; District No. 28, United Mine Workers of America, an unincorporated association, affiliated with the International Union, United Mine Workers of America; John Saxton, President, and W. F. Minton, Secretary-Treasurer, Individually and as Officers of said District No. 28; and International Union, United Mine Workers of America, an unincorporated association, and John L. Lewis, individually and as President of said International Union, Defendants

JUDGMENT AND ORDER—Filed January 25, 1944

Not being at that time fully advised of its judgment, the Court, on November 24, 1943, having taken time to

consider thereof, as appears by the order entered herein on that date, and thereafter briefs having been duly filed [fol. 772] for both plaintiff and defendants and for Southern Coal Producers Association, *amicus curiae;* and the Court, after full consideration of the evidence, oral argument and briefs of counsel, being now fully advised of its judgment, it is therefore

Ordered

that all objections to evidence, and all motions to strike out evidence, made by counsel during the course of trial and taken under advisement by the Court, be, and the same are, hereby overruled and denied, to which action of the Court in overruling their objections and denying their motions, the parties against whom this ruling is made, by counsel, duly objected and excepted upon grounds heretofore fully stated to the Court;

And the Court being of opinion, for reasons set out in its Findings of Fact and Conclusions of Law this day filed as a part of the record herein, that the law and the evidence sustain the contentions of the plaintiff upon the issues submitted to the Court, doth so adjudge; It is accordingly

Adjudged, Ordered and Declared:

(1) That the Fair Labor Standards Act of 1938 does not require that there be included within the work week of underground workers in plaintiff's mines, either time spent by such employees outside the portal of the mines before entering therein, or time spent in traveling from the portals to their usual places of work and return; and

(2) That plaintiff, in computing the work week of its underground employees on the basis of hours of work in the mines at their usual working places, exclusive of the lunch period, and the time spent outside the portals, and travel time from the portals to their usual working places and return, as provided in the effective wage agreements and continuations thereof, and in paying its underground workers for their services on that basis, has complied with and discharged all its obligations imposed upon it by the [fol. 773] Fair Labor Standards Act of 1938.

And all the objects of this action having been accomplished, defendants being entitled to recover nothing on their counter-claim, it is

Ordered

that the same be, and it hereby is, dismissed at the costs of the defendants; to all of which action of the Court in declaring the rights of the parties contrary to their contentions, and in dismissing this action at their costs, the defendants, by counsel, duly objected and excepted upon reasons fully stated to the Court.

And it is further

Ordered

that the Clerk of this Court certify and mail copies hereof, together with uncertified copies of the Court's Findings of Fact and Conclusions of Law this day filed, to George Richardson, Jr., Esq., 506 Commercial Bank Building, Bluefield, West Virginia, and William A. Stuart, Esq., Abingdon, Virginia, attorneys for the plaintiff, to Crampton Harris, Esq., 1618-20 First National Bank Building, Birmingham, Alabama, Frank W. Rogers, Esq., 306-17 Boxley Building, Roanoke, Virginia, Leonard G. Muse, Esq., 306-17 Boxley Building, Roanoke, Virginia, and Welly K. Hopkins, Esq., United Mine Workers Building, 900 15th Street, N. W., Washington, D. C., attorneys for the defendants; and to Edward R. Burke, Esq., 515 Southern Building, Washington, D. C., and John C. Gall, Esq., 701 Southern Building, Washington, D. C., attorneys for Southern Coal Producers Association, *amicus curiae*.

Enter:

(S.) A. D. Barksdale, United States District Judge.

[File endorsement omitted.]

[fol. 774] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

[fol. 775] NOTICE OF APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT—Filed April 12, 1944

Notice is hereby given that Local No. 6167, United Mine Workers of America, an unincorporated association, affiliated with the International Union, United Mine Workers

of America; Harlan Hampton, President, John A. White, Vice President, Omer Ketron, Recording Secretary, James W. Belcher, Financial Secretary, C. M. Mathena, Treasurer, Tony Farnese, Door Keeper, Individually and as Officers of said Local No. 6167; Carl Altizer, Omer Ketron and T. V. White, Individually and as Members of the Mine Committee of said Local No. 6167; H. D. Hampton, Tony Farnese, and James Al Smith, Individually and as Members of the Safety Committee of said Local No. 6167; Local No. 7327, United Mine Workers of America, an unincorporated association, affiliated with the International Union, United Mine Workers of America; J. H. Sheppard, President, J. E. Collins, Vice President, Forrest Ritchie, Recording Secretary, Josh Keen, Financial Secretary, C. F. Clark, Treasurer, Lyss Patrick, Door Keeper, Individually and as Officers of said Local No. 7327; Josh Keen, J. A. White and Paul Sykes, Individually and as Members of the Mine Committee of said Local No. 7327; Walter Jackson, J. S. Walker and Glenn Crouse, Individually and as Members of the Safety Committee of said Local No. 7327; District No. 28, United Mine Workers of America, an unincorporated association, affiliated with the International Union, United Mine Workers of America; John Saxton, President, and W. F. Minton, Secretary-Treasurer, Individually and as Officers of said District No. 28, and International Union, United Mine Workers of America, an unincorporated association, and John L. Lewis, Individually and as President of said [fol. 776] International Union, the defendants above named, hereby appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the final judgment and order entered in this action on the 25th day of January, 1944.

(S.) Crampton Harris, 1618-20 First National Building, Birmingham, Alabama; (S.) Welly K. Hopkins, 900 15th Street, N. W., Washington, D. C.; (S.) Frank W. Rogers, 306-317 Boxley Building, Roanoke, Virginia; (S.) Leonard G. Muse, 306-317 Boxley Building, Roanoke, Virginia, Attorneys for Appellants.

[fol. 777] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

STATEMENT OF THE POINTS ON WHICH THE APPELLANTS INTEND TO RELY ON APPEAL—Filed April 12, 1944

The appellants intend to rely on appeal upon the following points:

Point I

The Fair Labor Standards Act of 1938 does require that there be included within the work-week of underground workers in plaintiff's mines all the time from the time such employees are required to report and do report for work at the portal of the mine until they return to the portal at the end of the shift, less the regular lunch period, when they are relieved of all duties.

Point II

The plaintiff in computing the work-week of its underground employees on the basis of hours of work in the mines at their usual working places, exclusive of the lunch period, and the time spent outside the portals, and traveling time from the portals to their usual working places and return has not complied with and discharged all obligations imposed upon it by the Fair Labor Standards Act of 1938.

[fol. 778] Point III

The underground employees of the plaintiff who had workweeks in excess of forty hours per week during the period from April 1, 1943, to June 20, 1943, are entitled to judgment on their counterclaim against the plaintiff for all time in excess of forty hours in each work-week in an amount calculated at 1½ times the regular rate at which such employee was employed together with an equal amount as and for liquidated damages and for a reasonable attorneys' fee to be fixed by the court.

Point IV

The provisions of the Fair Labor Standards Act governing the payment for overtime employment in excess of

forty hours per week and providing an equal amount as liquidated damages and for the recovery of a reasonable attorney's fee apply and govern the payments to which an employee is entitled notwithstanding any custom or contract to pay such employee a less amount as compensation for his services than the Act requires.

(S.) Frank W. Rogers, Leonard G. Muse, Crampton Harris, Attorneys for Defendants (Appellants).

[fol. 779] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 780] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5246

LOCAL No. 6167, UNITED MINE WORKERS OF AMERICA, An unincorporated association, affiliated with the International Union, United Mine Workers of America; Harlan Hampton, President, John A. White, Vice President, Omer Ketron, Recording Secretary, James W. Belcher, Financial Secretary, C. M. Mathena, Treasurer, Tony Farnese, Door Keeper, Individually and as Officers of said Local No. 6167; Carl Altizer, Omer Ketron and T. V. White, Individually and as Members of the Mine Committee of said Local No. 6167; H. D. Hampton, Tony Farnese, and James Al Smith, Individually and as Members of the Safety Committee of said Local No. 6167; Local No. 7327, United Mine Workers of America, an Unincorporated association, affiliated with the International Union, United Mine Workers of America; J. H. Sheppard, President, J. E. Collins, Vice President, Forrest Ritchie, Recording Secretary, Josh Keen, Financial Secretary, C. F. Clark, Treasurer, Lyss Patrick, Door Keeper, Individually and as Officers of said Local No. 7327; Josh Keen, J. A. White and Paul Sykes, Individually and as Members of the Mine Committee of said Local No. 7327; Walter Jackson, J. S. Walker and Glenn Crouse, Individually and as Members of the Safety Committee of said Local No. 7327; District No. 28, United Mine Workers of America, an unincorporated associa-

tion, affiliated with the International Union, United Mine Workers of America; John Saxton, President, and W. F. Minton, Secretary-Treasurer, Individually and as Officers of said District No. 28, and International Union, United Mine Workers of America, an unincorporated association, and John L. Lewis, Individually and as President of said International Union, Appellants,

versus

JEWELL RIDGE COAL CORPORATION, a Corporation, Appellee

Appeal from the District Court of the United States for the Western District of Virginia, at Roanoke

DOCKET ENTRIES.

April 15, 1944, the transcript of record is filed and the cause docketed.

Same day, the appearance of Crampton Harris, Frank W. Rogers and Leonard G. Muse is entered for the appellants.

[fol. 781] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing volume I, together with a separate volume entitled "Volume of Exhibits" is a true copy of the entire record and proceedings in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 15th day of April, A. D., 1944.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit. (Seal.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

LOCAL No. 6167, UNITED MINE WORKERS OF AMERICA, AN UNINCORPORATED ASSOCIATION, AFFILIATED WITH THE INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL., PETITIONERS,

vs.

JEWELL RIDGE COAL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

VOL. II

EXHIBITS

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No. 12—Agreements between Jewell Ridge Coal Corp. and United Mine Workers of America, etc., effective Sept. 16, 1937	49	629
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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 18, 1944.

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[fol. 1] PLAINTIFF'S EXHIBIT No. 1

Code of Fair Competition for the Bituminous Coal Industry

Article I

Purposes

To effectuate the policies of Title I of the National Industrial Recovery Act, the following provisions are submitted as a Code of Fair Competition for the bituminous coal industry and upon approval by the President shall be the standards of fair competition for this Industry.

Article II

Definitions

As used in this Code the term "Industry" as applied to the Bituminous Coal Industry means the production and original sale of all kinds of coal (except anthracite), lignite, and the production and original sale of coke other than by-product coke.

The term "employer" includes any person employing labor in any phase of the industry.

The term "employee" includes all persons employed in the industry except members of the executive, supervisory, technical and confidential personnel.

The term "Administrator" means the official designated by the President to administer the National Industrial Recovery Act.

Article III

Maximum Hours of Labor

No employee shall be employed in excess of 40 hours in any calendar week after the effective date of this Code. No employee shall be required or permitted to work more than eight hours in any one day at the usual working places or otherwise in or about the mine, (exclusive of lunch period) whether paid by the hour or on a tonnage or other piece work basis.

[fol. 2] There shall be excepted from the foregoing limitations (a) employees required because of accidents which temporarily necessitate longer hours for them; (b) supervisors, clerks, technicians and that small number of employees at each mine whose daily task includes the handling

of man trips and haulage animals and those who are required to remain on duty while men are entering and leaving the mine.

The foregoing maximum hours of work shall not be construed as a minimum; and if at any mine a majority of the employed workers express their desire, by written request to the employer, to share available work with bona fide unemployed workers of the same mine, the number of hours work may be adjusted accordingly by mutual agreement between such employed workers and their employers.

Article IV

Minimum Rates of Pay

The basic minimum rate for inside skilled labor and the basic minimum rate for outside common labor shall be the rate hereinafter set forth in Schedule "A" for each district therein described for each such classification of labor, with the understanding that other classifications of employment will maintain their customary differentials above or below said basic minimum rates and that payments for work performed on a tonnage or other piecework basis will maintain their customary relationship to the payments on a time basis provided in said basic minimum rates.

Article V

Conditions of Employment

(a) Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) employers shall comply with the maximum hours of labor, minimum rates of pay and other conditions of employment, approved or prescribed by the President.

(b) In the submission or acceptance of this Code the interpretation is adopted of the requirements transcribed

in the foregoing paragraph (a) from Section 7 (b) of the National Industrial Recovery Act, which was jointly announced by the Administrator and General Counsel of the National Recovery Administration on August 24, 1933, a copy of which is attached to this Code as Schedule "B".

[fol. 3] (c) Except as otherwise hereinafter provided, all coal mined on a tonnage basis shall be weighed and the miner paid on the basis of a 2,000 or 2,240 pound ton. The miners shall have the right to a checkweighman, of their own choosing, to inspect the weighing of coal; *Provided*, that where mines are not now equipped to weigh coal a reasonable time may be allowed to so equip such mines; and provided, that in any case where rates of pay are based on any other method than on actual weights, the miners shall have the right to check the accuracy and fairness of the application of such methods, by representatives of their own choosing.

(d) The net amount of wages due shall be paid semimonthly in lawful money or par-check at the option of the operators. Any deductions from employees' pay, if not a matter of agreement, shall be in conformity with such general rules and regulations as the Administrator may prescribe for the purpose of preventing unfair deductions, or those which may in effect lower the rates of pay herein provided.

(e) Employees other than maintenance or supervisory men or those necessary to protect the property, shall not be required as a condition of employment to live in homes rented from the employer.

(f) No employee shall be required as a condition of employment to trade at the store of the employer.

(g) No person under seventeen (17) years of age shall be employed inside any mine or in hazardous occupations outside any mine, provided, however, that where a state law provides a higher minimum age, the state law shall govern; no person under the age of sixteen (16) shall be employed in or about a mine.

(h) As soon as possible after the adoption of this Code, the National Recovery Administration shall undertake, through a designated committee or agency, an investigation for the purpose of reporting on or before December 31, 1933; upon (a) the practicability and cost (assuming the

maintenance of existing rates of pay) of applying to bituminous coal mining a shorter work day and work week, (b) the effect of an advisability of revising wage differentials in the various divisions and districts of the industry and in the event of recommended change specification of the amount thereof; (c) the sales prices obtained for coal, or reasonably to be anticipated, up to the time of the report, for the purpose of determining whether wages and employment can be further increased or maintained without imposing undue burdens upon the industry.

On January 5, 1934, there shall be held a conference between representatives of employers and employees operating under this Code, together with representatives of the National Recovery Administration, for the purpose of determining what, if any, revisions may be desirable at that time of the wages, hours and differentials, or any other requirements of this Code, on the basis of conditions then existing and the report of the representatives of the National Recovery Administration made as hereinbefore provided.

[fol. 4] Unless revised by mutual agreement, as the result of said conference beginning January 5, 1934, the hours of work, minimum rates of pay and wage differentials as set forth in this Code shall continue in effect until April 1, 1934.

Article VI

Unfair Practices

Section 1. The selling of coal under a fair market price (necessary to carry out the purposes of the National Industrial Recovery Act, to pay the minimum rates herein established, and to furnish employment for labor) is hereby declared to be an unfair competitive practice and in violation of this Code. In order to determine the fair market price, agencies shall be established, as hereinafter provided, and sales of coal at any time at a price less than a fair market price determined and published, as hereinafter provided, shall create against any person selling at a lower rate a prima facie presumption that such a person is engaged in destructive price cutting and unfair competition. It shall be proper in determining such fair market price to take into consideration, in addition to the matters above

set forth, also competition with other coals, fuels and forms of energy or heat production.

Section 2. The fair market prices of coal of any grade and character referred to in the next preceding section, subject to the power of review hereinafter stated shall be

(a) The minimum prices for the various grades and sizes in the various consuming markets which may be established for future application by a marketing agency or by marketing agencies, of whatever form or howsoever constituted, now existing or hereafter created or organized, acting for coal producers truly representative of at least two-thirds of the commercial tonnage of any coal district or group of districts, such minimum prices to be effective when and as announced as provided in Section 4 hereof.

(b) The minimum prices for the various grades and sizes in the various consuming markets, where no such marketing agency exists, which may be established for future application by the respective Code Authorities hereinafter set up, for their respective areas, after [fols. 5-6] having given consideration to the various conditions and circumstances entering into the sale of each grade and class of commercial coal produced in the district or group of districts it represents, such minimum prices to be effective when announced as provided in Section 4 hereof.

(c) As a basis for determining the fair market price to be announced and published, as provided in the two preceding clauses, the Code Authorities shall utilize the Classifications of coals made by such agencies as are referred to in clause (a) of this section, and shall classify the coals in said districts referred to in clause (b) of this section, to which the various prices apply. Said Code Authorities shall, at all times, provide and keep open an office during business hours to which any coal producer in said districts and representative of the Administrator may apply for information with respect to said classifications and prices.

(d) The term "marketing agency" or "agency" as used in this Article shall include any trade association of coal producers complying with the requirements of

a marketing agency and exercising the functions thereof.

Section 3. The fair market prices established for future application under the provisions of Section 2 (a) shall be reported to said Code Authorities by any such marketing agencies in such manner as may be required by such authorities.

Section 4. The fair market prices of bituminous coal, established as aforesaid by such agencies and Code Authorities shall be published on the effective date of this Code, after approval by the Presidential Member of the Code Authority (acting under the direction of the Administrator), who in his approval may permit a reduction or increase in said prices by action of said agencies or Authorities within the limits which he may prescribe, and thereafter shall be published whenever any change is made therein, and not less frequently than once each month, and on the first of the month. Simultaneously with such publication, said fair market prices of bituminous coal shall be transmitted by the Code Authorities to the National Recovery Administrator for his further review and subsequent action.

* * * * * * *

[fol. 7] certain purchasers' services or privileges not extended to all purchases under like terms and conditions, is a violation of this Code.

Section 12. An attempt to purchase business, or obtain information concerning a competitor's business by gifts or bribes, is a violation of this Code.

Section 13. The intentional misrepresentation of analysis and/or sizes or the intentional making, causing or permitting to be made, or publishing, of any false, untrue, misleading or deceptive statement, by way of advertising, invoice, or otherwise, concerning the size, quality, character, nature, preparation or origin of any coal, bought or sold, is a violation of this Code.

Section 14. The unauthorized use, either in written or oral form, of trade-marks, trade names, slogans or advertising matter already adopted by a competitor, or deceptive approximation thereof, is a violation of this Code.

Section 15. Inducing or attempting to induce, by any means or device whatsoever, a breach of contract between a competitor and his customer during the term of such contract, is a violation of this Code.

Section 16. Nothing in the foregoing sections of this Article shall prevent any American producer from creating special prices for overseas exports.

Section 17. The splitting or dividing of commissions, brokers fees, or brokerage discounts, or otherwise in any manner through sham or indirection the use of a brokerage commission or jobbers arrangements or sales agency for making discounts, allowances, or rebates, or prices other than those determined as provided in this Code, to any industrial consumer or to any retailer, or to others, shall be a violation of this Code.

Section 18. To sell to, or through, any broker, jobber, commission account, or sales agency, which is in fact an agent for an organization of retailers or industrial consumers, whereby they secure indirectly a discount, dividend, allowance, or rebates, or a price other than that determined as provided in this Code shall be a violation of this Code.

[fol. 8]

Article VII

Administration

Section 1. For the purposes of Administration of this Code, the Bituminous Coal Industry is hereby divided into five divisions as follows:

Division No. I. Pennsylvania, Ohio, Lower Peninsula of Michigan, Maryland, West Virginia, Kentucky, Northern Tennessee (including all counties not included within Division No. III), Virginia and North Carolina.

Division No. II. Iowa, Indiana and Illinois.

Division No. III. Alabama, Southern Tennessee (including Marion, Grundy, Sequatchie, White, Hamilton, Bledsoe and Rhea Counties), and Georgia.

Division No. IV. Missouri, Kansas, Arkansas, Oklahoma and Texas.

Division No. V. New Mexico, Colorado, Utah, Wyoming, North Dakota, South Dakota, Montana, Idaho, Washington, Oregon, California, Nevada and Arizona.

In each of the foregoing five divisions, sub-divisions may be established, as hereinafter provided.

Section 2. *Divisional Code Authorities:* For each of the foregoing divisions there shall be established within ten days after the effective date hereof, or within such further time as may be permitted by the Administrator, a Divisional Code Authority, or Sub-Divisional Code Authorities for the administration of this Code within such division, either for the division as a unit, or for subdivisions thereof, respectively, as may be determined. All the members of a Code Authority, except one (without vote and to be appointed by the President) shall be selected by an association or associations, or a committee of coal producers within the divisions or subdivisions which shall be truly representative of the industry therein and impose no inequitable restrictions on admission to membership. A full report of any such action taken to establish a Code Authority shall be made to the Administrator and shall become effective upon approval by him. A subdivision shall consist of a geographical area within which all coal producers shall be entitled to membership in the association or committee establishing the Code Authority. The Administrator shall have power to limit the number of subdivisions within a division and to determine any controversy arising in the establishment of such a Code Authority, and his [fol. 9] decision shall be conclusive as to compliance with the requirements of this Section and of the National Industrial Recovery Act in the initial establishment of such a Code Authority.

In the event that Sub-Divisional Code Authorities are established within a division, such Sub-Divisional Authorities shall establish a Divisional Code Authority to exercise the functions hereinafter provided for a Divisional Code Authority and any other functions which may be conferred upon the Divisional Code Authority by the Sub-Divisional Code Authorities, all in conformity with any rules and regulations prescribed by the Administrator. One member of a Divisional Code Authority, without vote, shall be appointed by the President.

A Code Authority shall administer this Code in its Division or Sub-division and shall have the duties and exercise the powers which are conferred upon it in this article and in Article VI. of this Code, and we shall have author-

ity to adopt appropriate by-laws, rules and regulations for the exercise of its functions.

Marketing agencies and trade associations may be established or maintained within any division or subdivision by a voluntary association of producers within any producing district therein, as such district may be defined by the Code Authority and function under such general rules and regulations as may be prescribed by the Code Authority, with the approval of his administrator, for the purpose of preventing any unfair practices, as defined in Article VI. of this Code.

Section 3. Each Code Authority shall collect and compile any reports and other information required under the National Industrial Recovery Act; and in investigations of any complaint of unfair practices the Presidential member of a Code Authority shall have power to require reports from, and shall be given access to inspect the books and records of producers within the jurisdiction of such Code Authority to the extent he may deem necessary for the determination of the validity of the complaint.

The expense of administering this Code by a Divisional (or Sub-divisional) Code Authority shall be borne by those subject to such Code Authority, each paying his proportionate share, as assessed, computed on a tonnage basis, in accordance with regulations prescribed by law and the Code Authority with the approval of the Administrator.

Section 4. *Industrial Board.* There shall be established within ten days after the creation of the Divisional Code Authorities a National Bituminous Coal Industrial Board, consisting of four members designated by the Divisional Code Authority of Division No. I, two members designated by the Divisional Code Authority of Division No. II, one member each designated by the Divisional Code Authorities of Divisions No. III, IV, and V, and the five members of the Divisional Code Authorities who have been appointed by the President. This Board shall have the duties and exercise the powers conferred upon it in this Code, or any revisions thereof and particularly shall meet from time to time at the call of the Administrator, who shall be ex officio [fol. 10] Chairman there of, to consider and to make recommendations to the Divisional Code Authorities and to the President as to any amendments of this Code, or other

measures which may stabilize and improve the conditions of the industry and promote the public interest therein.

Section 5. *Labor Relations.* (a) Any controversy concerning hours, wages and conditions of employment, or compliance with the provisions of Article V of this Code, between employers and employees who are organized or associated for collective action shall, if possible, to be adjusted by conference and negotiation between duly designated representatives of employers and such employees, meeting either in a mine conference or district conference or divisional conference, as the machinery for such conference may be established by agreement of the parties thereto; and it shall be the duty of employers and employees to exert every reasonable effort to establish such a machinery of adjustment and to utilize it to negotiate to a conclusion such controversies wherever possible.

(b) Any such controversy which cannot be settled in the manner so provided and which threatens to interrupt or has interrupted, or is impairing, the efficient operation of any mine or mines to such an extent as to restrain interstate commerce in the products thereof, shall be referred to the appropriate Bituminous Coal Labor Board, established as hereinafter provided, and the decision of said Board shall be accepted by the parties to the controversy as effective for a provisional period of not longer than six months, to be fixed by the Board.

(c) During the consideration of any such controversy either by the agreed machinery of adjustment, or by the Bituminous Coal Labor Board, neither party to the controversy shall change the conditions out of which the controversy arose, or utilize any coercive or retaliatory measures to compel the other party to accede to its demands.

(d) If any such controversy shall involve or depend upon the determination of who are the representatives of the employees chosen as provided in Section 7 (a) of the National Industrial Recovery Act, the appropriate Bituminous Coal Labor Board, through any agent or agency it may select, shall have the power to determine the questions by an investigation and, if necessary, by a secret ballot taken under its direction.

(e) A Bituminous Coal Labor Board shall be appointed by the President of each Division, except there shall be two Boards for Division No. 1, to exercise the powers herein conferred upon it, which shall consist of three members, one to be selected from nominations submitted by organizations of employees within such Division, one to be selected from nominations by the Divisional Code Authority and one who shall be wholly impartial and disinterested representative of the President. The expenses of such board shall be met by equal contributions from the employers and employees nominating members, the amount and method of collecting which shall be determined by regulations prescribed by the President.

[fol. 11] (f) There will be a National Bituminous Coal Labor Board composed of the members of the six divisional labor boards which may be convened upon call of the Administrator in the event that—

1. A controversy involves employers and employees of more than one division, or

2. The decision of a divisional labor board affects operating conditions of more than one division either directly or because of its effect upon competitive marketing, or

3. In the opinion of the Administrator the decision of a divisional labor board involves the application of a policy affecting the general public, or the welfare of the industry as a whole.

The National Bituminous Coal Labor Board may exercise all the powers conferred upon a divisional labor board, either in giving original consideration to a controversy, or in reviewing the decision of a divisional labor board, which may be either affirmed, set aside and—or modified.

[fol. 12]

Article VIII

Safety

Employers and employees shall cooperate in maintaining safe conditions of operation in compliance with the applicable requirements of State laws or regulations in conformity therewith.

Article IX

Amendments

Any Code Authority may propose amendments to this Code from time to time effective generally or as to the area within its jurisdiction which, after submission to any other Code Authority affected thereby (which shall include the divisional Code Authority in case of an amendment proposed by a subdivisional Code Authority), may be recommended by the Administrator for the approval of the President.

Article X

This Code and all the provisions thereof are expressly made subject to the right of the President, in accordance with the provision of sub-section (b) of Section 10 of the National Industrial Recovery Act, from time to time to cancel or modify any order, approval, license, rule or regulation issued under Title I of said Act and specifically, but without limitations, to the right of the President to cancel or modify his approval of this Code or any conditions imposed by him upon his approval thereof.

Article XI

Effective Date and Termination

This Code shall become effective on the second Monday following its approval by the President, and shall continue in effect until April 1, 1934, and thereafter, in the absence of the exercise of the power reserved to the President in Article X, subject to the exercise of the option, after 30 days notice to the Administrator, by any coal producer to withdraw his consent after April 1, 1934, to the further enforcement of the Code as a Code to which he has voluntarily given his consent.

[fol. 13]

SCHEDULE A

Basic Minimum Rates

District A	Minimum Inside Skilled Labor Per Day	Minimum Inside Skilled Labor Per Hour	Minimum Outside Common Labor Per Day	Minimum Outside Common Labor Per Hour
Pennsylvania [1]	$4.60	57½	$3.60	45
Ohio	4.60	57½	3.60	45
Lower Peninsula of Michigan	4.60	57½	3.60	45
Panhandle District of West Virginia [2]	Note A		Note A	
Somerset County, Pennsylvania	Note A		Note A	
District B				
Northern West Virginia [3]	4.36	54½	3.36	42
Preston County, West Virginia	Note A		Note A	
District C				
Southern West Virginia [4]	4.20	52½	3.20	40
Eastern Kentucky [5]	4.20	52½	3.20	40
Upper Potomac District of West Virginia [6]	4.20	52½	3.20	40
Maryland	4.20	52½	3.20	40
Virginia	4.20	52½	3.20	40
Northern Tennessee [7]	Note A		Note A	
Whitley, McCreary, Belt and Harlan Counties of Kentucky	Note A		Note A	
District D				
Indiana [8]	4.57½	57 1/5	4.20	52½
Warrick and Vanderburgh Counties of Indiana	Note A		Note A	
District E				
Illinois	5.00	62½	4.00	50
District F				
Iowa [9]	4.70	58¾	4.00	50
Wayne and Appanoose Counties of Iowa	Note A		Note A	

[fol. 14]

District G				
Missouri, Kansas, Arkansas and Oklahoma	3.75	46⅞	3.28	41
Texas	Note A		Note A	
District H				
Western Kentucky [10]	Note A		Note A	
District J				
Alabama	Note A		Note A	
Georgia	Note A		Note A	
Southern Tennessee [11]	Note A		Note A	

[fol. 15]

District K				
New Mexico	4.48	56	3.75	46⅞
Southern Colorado [12]	4.44	55½	3.75	46⅞
District L				
Northern Colorado [13]	5.00	62½	3.75	46⅞
District M				
Utah	5.44	68	4.48	56

SCHEDULE A—Continued

Basic Minimum Rates

	Minimum Inside Skilled Labor Per Day	Minimum Inside Skilled Labor Per Hour	Minimum Outside Common Labor Per Day	Minimum Outside Common Labor Per Hour
District N				
Southern Wyoming	5 42	67¾	4 44	55½
Northern Wyoming	5 42	67¾	4 54	56¾
District O				
Montana	5 63	70⅜	4 82	60¼
District P				
Washington	5 40	67½	4 00	50
District Q				
North Dakota	Note A		Note A	
South Dakota	Note A		Note A	

[fol. 16]

[1] Excludes Somerset County.

[2] Includes Hancock, Brooke, Ohio and Marshall Counties.

[3] Includes Monongalia, Marion, Harrison, Taylor, Lewis, Barbour, Gilmer, Upshur, Randolph, Braxton and Webster Counties and those mines in Nicholas County served by the B. & O. R. R.

[4] Includes all mines in counties not named under districts A and B and the Upper Potomac District.

[5] Includes all mines in Kentucky located east of a north and south line drawn along the Western boundary line of the City of Louisville except those located in Whitley, McCreary, Bell and Harlan Counties.

[6] Includes Grant, Mineral and Tucker Counties.

[7] Includes all counties not named under Southern Tennessee in District J.

[8] Excludes Warrick and Vanderburgh Counties.

[9] Excludes Wayne and Appandese Counties.

[10] Includes all mines in Kentucky west of a north and south line drawn along the western boundary of the City of Louisville.

[11] Includes Marion, Grundy, Sequatchie, White, Hamilton, Bledsoe and Rhea Counties.

[12] Includes all counties in Colorado not named under District L.

[13] Includes Jackson, Larimer, Weld, Boulder, Adams, Arapahoe, El Paso, Douglas, Elbert and Jefferson Counties.

Note A: Where minimum rates are not shown in the foregoing schedule, minimum rates shall be approved or prescribed by the President, prior to the effective date of this Code.

Note B: Differences between districts in the foregoing minimum rates are not to be considered as fixing permanent wage differentials or establishing precedents for future wage scales.

[fol. 17]

Schedule B

Statement Concerning Section 7 (a) of National Industrial Recovery Act

The plain meaning of Section 7 (a) cannot be changed by any interpretation by anyone. It is the function of the Administrator and the courts to apply and to interpret the law in its administration; and no one else can assume this function and no official interpretation can be circumscribed, affected or foreclosed by anyone writing his own interpreta-

tion into any code or agreement. Such an interpretation has no place there and cannot be permitted.

The words "open shop" and "closed shop" are not used in the law and cannot be written into the law.

These words have no agreed meaning and will be erased from the dictionary of the N. R. A.

The law requires in codes and agreements that "employees shall have the right to organize and bargain collectively through representatives of their own choosing."

This can mean only one thing, which is that employees can choose anyone they desire to represent them, or they can choose to represent themselves. Employers likewise can make collective bargains with organized employees, or individual agreements with those who choose to act individually; provided, of course, that no such collective or individual agreement is in violation of any State or federal law. But neither employers or employees are required, by law, to agree to any particular contract, whether proposed as an individual or collective agreement.

[fol. 18] The law provides that employees shall be free from the interference, restraint or coercion of employers in his exercise of their rights established by the law. The conduct of employers which is here prohibited has been defined by the Supreme Court in the case entitled—T. & N. O. R. R. v. Brotherhood of Railway Clerks, 281 U. S. 548. The rulings of the Supreme Court lay down the law which governs the N. R. A.

Under Section 7 (a), employers are forbidden to require "as a condition of employment" that an employee shall either "join a company union", or "refrain from joining, organizing, or assisting a labor organization of his own choosing." The law does not prohibit the existence of a local labor organization, which may be called a company union and is composed only of the employees of one company. But it does prohibit an employer from requiring, as a condition of employment, that any employee join a company union and it prohibits the maintenance of a company union, or any other labor organization, by the interference, restraint or coercion of an employer.

If there is any dispute in a particular case over who are the representatives of the employees of their own choosing, the N. R. A. will offer its services to conduct an impartial investigation and, if necessary, a secret ballot to settle the question.

The N. R. A. will not undertake in any instance to decide that a particular contract should be made, or should not be made between lawful representatives of employees and employers; or to decide that a contract which has been lawfully made should not be enforced.

Cooperation in all industrial relations depends largely on [fol. 19] the making and maintenance of agreements. The N. R. A. will promote and aid such cooperation.

Hugh S. Johnson, Donald R. Richberg.

[fol. 20] PLAINTIFF'S EXHIBIT No. 2

Approved Code No. 24—Amendment No. 1

Registry No. 702-45

National Recovery Administration

Amendment to Code of Fair Competition for the Bituminous Coal Industry as Approved on March 31, 1934

N. R. A.

We Do Our Part

United States Government Printing Office, Washington: 1934

[fol. 21] Approved Code No. 24—Amendment No. 1

Amendment to Code of Fair Competition for the Bituminous Coal Industry as Approved on March 31, 1934.

Order

Approving Amendment to Code of Fair Competition for the Bituminous Coal Industry

A serious emergency being threatened in the Bituminous Coal Industry and an application for the approval of an amendment to the Code of Fair Competition for the Bituminous Coal Industry in accordance with Exhibit A hereto annexed having been duly made by the Code Authorities for the Eastern Sub-division of Division No. 1, Western Pennsylvania, Sub-division of Division No. 1 and for Ohio,

pursuant to Article IX of said Code, and it appearing to me that such amendment will tend to effectuate the policy of Title 1 of the National Industrial Recovery Act; and is necessary in this emergency:

Pursuant to the authority vested in me under said Title of said Act and under said Code, by Executive Orders of the President, including Executive Order No. 6543-A dated December 30, 1933, and otherwise, it is hereby ordered that said application for amendment of said code be and it hereby is approved effective on April 1, 1934, in words and figures as set forth in said Exhibit A hereto annexed, subject to modification by my further order on the basis of cause shown, either at a public hearing thereon which shall be held on April 9, 1934, or otherwise.

Hugh. S. Johnson, Administrator for Industrial Recovery.

Washington, D. C., March 31, 1934.

[fol. 22] EXHIBIT "A"

Resolved, That amendments to Article III and Article IV of the Code of Fair Competition for the Bituminous Coal Industry by and the same hereby are proposed, to be and to become effective generally, so that said Article III and IV will read as follows:

Article III—Maximum Hours of Labor

No employee, except members of the executive, supervisory, technical and confidential personnel, shall be employed in excess of seven hours per day and five days per week, subject to the exceptions hereinafter stated.

Seven hours of labor shall constitute a day's work and this means seven hours work at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid on the day or the tonnage or other piecework basis; except in cases of accident which temporarily necessitate longer hours for those required on account thereof; and also excepting that number of workers in each mine whose daily work includes the handling of man-trips and those required to remain on duty while men are entering and leaving the mine.

The following classes of mine workers are exempted from the provisions as to the maximum hours of work:

(a) All workers engaged in the transportation of coal shall work the additional time necessary to handle man-trips, and/or haulage animals, and all coal in transit, and shall be paid the regular hourly rates. Mine workers engaged in the dumping, handling and preparation of coal, and in the manufacture of coke, shall work the additional time necessary, not to exceed thirty minutes, to dump and prepare the coal delivered to the tipple each day and to complete the usual duties incidental to the operation of coke ovens, and shall be paid the regular hourly rate. This rule shall not encourage the working of such overtime except where it is necessary to take care of the conditions named.

(b) Employees engaged at power houses, substations and pumps operating continuously for 24 hours daily are especially exempted from the seven-hour provision. Special exemptions of employees other than those named above may be provided, by joint agreements negotiated in accordance with this code, which shall not provide for work in excess of 8 hours per day and 40 hours per week.

Article IV—Maximum Rates of Pay

From April 1, 1934 to April 1, 1935 the basic minimum rate for inside skilled labor and the basic minimum rate for outside common labor shall be the rate hereinafter set forth in Schedule "A" for each district therein described for each such classification of labor, with the understanding that other classifications of employment will maintain their customary differentials above or below said basic minimum rates.

To secure the parity between minimum rates for day labor and minimum pay for work performed on a tonnage [fol. 23] or other piece work basis, the latter shall be determined by the following increases over existing rates in all of the Districts of Schedule "A" except as hereinafter expressly provided:

On the basis of the 2,000 pound ton, an increase of 10 cents per ton for pick mining; 8 cents per ton for machine mining; an increase of 1 cent per ton for cutting, and for all yardage and deadwork rates an increase of 9 percent.

In addition to the increases above provided the minimum rates for tonnage and other piece work in Districts B, G, H, J and J-1, shall be further increased by an amount sufficient to maintain the parity between pay for such tonnage and piece work and the basic minimum rates for day labor as prescribed for such Districts in Schedule "A".

SCHEDULE A

Basic Minimum Rates

	Minimum Inside Skilled Labor		Minimum Outside (Common Labor)	
	Per Day	Per Hour	Per Day	Per Hour
District A				
Pennsylvania	$5.00	$0.71 4/10	$4.00	$0.57 1/10
Ohio	5.00	.71 4/10	4.00	.57 1/10
Lower Peninsula of Mich.	5.00	.71 4/10	4.00	.57 1/10
Panhandle District of W. Va.[1]	5.00	.71 4/10	4.00	.57 1/10
District B				
Northern West Virginia [2]	5.00	.71 4/10	4.00	.57 1/10
District C				
Southern West Virginia [3]	4.60	.65 7/10	3.60	.51 4/10
Eastern Kentucky [4]	4.60	.65 7/10	3.60	.51 4/10
Upper Potomac Dist. of W. Va.[5]	4.60	.65 7/10	3.60	.51 4/10
Maryland	4.60	.65 7/10	3.60	.51 4/10
Virginia	4.60	.65 7/10	3.60	.51 4/10
Northern Tennessee [6]	4.60	.65 7/10	3.60	.51 4/10
District D				
Indiana	4.57½	.65 5/10	4.20	.60
District E				
Illinois	5.00	.71 4/10	4.00	.57 1/10
District F				
Iowa [7]	4.70	.67 1/10	4.00	.57 1/10
Wayne & Appanoose Counties, Iowa	4.56	.65 1/10	4.00	.57 1/10
District G				
Missouri, Kansas, Arkansas, Oklahoma	4.60	.65 7/10	4.00	.57 1/10

[fol. 24]

District H				
Western Kentucky [8]	4.60	.65 7/10	3.75	.53 6/10
District J				
Alabama	4.60	.65 7/10	3.60	.51 4/10
Georgia	4.60	.65 7/10	3.60	.51 4/10
Southern Tenn., Hamilton and Rhea Counties	4.60	.65 7/01	3.60	.51 4/10
District J-1				
Marion, Grundy, Sequatchie, White, Van Buren, Warren and Bledsoe Counties in the State of Tennessee	4.60	.65 7/10	3.60	.51 4/10

SCHEDULE A—Continued

	Basic Minimum Rates			
	Minimum Inside Skilled Labor		Minimum Outside (Common Labor)	
	Per Day	Per Hour	Per Day	Per Hour
District K				
New Mexico	5.10	.72 8/10	4.10 8/10	.58 6/10
Southern Colorado [9]	5.10	.72 8/10	4.10 8/10	.58 6/10
District L				
Northern Colorado	5.25	.75	4.25	.60 7/10
District M				
Utah	5.44	.77 7/10	4.48	.64

[1] Includes Hancock, Brooke, Ohio and Marshall Counties.
[2] Includes Monogalia, Marion, Harrison, Taylor, Lewis, Barbour, Gilmer, Upshur, Randolph, Braxton, Preston and Webster Counties and those mines in Nicholas County served by the B. & O. R. R.
[3] Includes all mines in counties in West Virginia not named under Districts A and B and the Upper Potomac District.
[4] Includes all mines in Kentucky located east of a north and south line drawn along the Western boundary of the City of Louisville.
[5] Includes Grant, Mineral and Tucker Counties.
[6] Includes all counties in Tennessee not named under Southern Tennessee in District J and J-1.
[7] Excludes Wayne and Appanoose Counties.
[8] Includes all mines in Kentucky west of a north and south line along the western boundary of the City of Louisville.
[9] Includes all Counties in Colorado not named under District L.
[10] Includes Jackson, Larimer, Weld, Boulder, Adams, Arapahoe, El Paso, Douglas, Elbert and Jefferson Counties.

[fol. 25]

District N				
Southern Wyoming	$5.42	$0.77 5/10	$4.44	$0.63 5/10
Northern Wyoming	5.42	.77 5/10	4.54	.64 9/10
District O				
Montana	5.63	.80 5/10	4.82	.68 9/10
District P				
Washington	5.40	.77 1/10	4.00	.57 1/10
District Q				
North Dakota	4.50	.64 3/10	3.70	.52 9/10
	Tipple Employees			
North Dakota (strip mining, pit labor)	4.50	.64 3/10	3.70	.52 9/10
South Dakota	4.50	.64 3/10	3.70	.52 9/10

Note: Differences between districts in the foregoing minimum rates are not considered as fixing permanent wage differentials or establishing precedents for future wage scales.

Resolved: That the Chairman of this Code Authority deliver a copy of this resolution to the National Recovery Administration, to the end that it may submit the same to any other Code Authority affected thereby.

Resolved: That the National Recovery Administrator be and he hereby is requested to recommend said amendments for the approval of the President.

Resolved: That the National Recovery Administrator take such steps as may be appropriate to cause said amendments to become effective on April 1, 1934.

Certificate

I hereby certify that the foregoing is a true and correct copy of a resolution adopted by the Code Authority for the Eastern Sub-division of Division No. 1 under the Bitu-
[fol. 26] minous Coal Code at a meeting held by it in Washington, D. C., on the 30th day of March, 1934.

Walter A. Jones, Secretary.

I hereby certify that the foregoing is a true and correct copy of a resolution adopted by the Code Authority of Western Pennsylvania, Sub-division of Division No. 1 under the Bituminous Coal Code at a meeting held by it in Washington, D. C., on the 30th day of March, 1934.

Byron H. Canon, Secretary.

I hereby certify that the foregoing is a true and correct copy of a resolution adopted by the Sub-divisional Code Authority for Ohio under the Bituminous Coal Code at a meeting held by it in Washington, D. C., on the 30th day of March, 1934.

R. L. Ireland, Secretary.

Approved Code No. 24, Amendment No. 1, Registry No. 702-45.

[fol. 27] PLAINTIFF'S EXHIBIT No. 3

Approved Code No. 24—Reprint. Registry No. 702—45

National Recovery Administration

Code of Fair Competition for the Bituminous Coal Industry as Approved on September 18, 1933 by President Roosevelt

Includes Amendments 1-3, Inclusive

[fol. 28] This publication is for sale by the Superintendent of Documents, Government Printing Office, Washington,

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[fol. 29] Approved Code No. 24

Code of Fair Competition for the Bituminous Coal Industry as Approved on September 18, 1933 by President Roosevelt

Executive Order

An application having been duly made, pursuant to and in full compliance with the provisions of Title I of the National Industrial Recovery Act, approved June 16, 1933, for my approval of a Code of Fair Competition for the Bituminous Coal Industry, and hearings having been held thereon and the Administrator having rendered his

report containing an analysis of the said Code of Fair Competition together with his recommendations and findings with respect thereto, and the Administrator having found that the said Code of Fair Competition complies in all respects with the pertinent provisions of Title I of said Act and that the requirements of clauses (1) and (2) of subsection (a) of Section 3 of the said Act have been met:

Now, Therefore, I, Franklin D. Roosevelt, President of the United States, pursuant to the authority vested in me by Title I of the National Industrial Recovery Act, approved June 16, 1933, and otherwise, do adopt and approve the report, recommendations, and findings of the Administrator and do order that the said Code of Fair Competition be and is hereby approved, subject to the following conditions:

(1) There shall be added to the first paragraph of Section 3 of Article VII of the Code the following sentence:

> All coal producers subject to the Code shall furnish to any government agency or agencies designated by the Administrator such statistical information as the Administrator may, from time to time, deem necessary for the purposes recited in Section 3 (a) of the National Industrial Recovery Act and any reports and other information collected and compiled by a Code Authority, as heretofore provided, shall be transmitted to such government agencies as the Administrator may direct.

(2) There shall be added after the first sentence of Section 4 of Article VII the following sentence:

> The President may appoint not more than three members of the Industrial Board in addition to, or in substitution for one or more of, the aforesaid six members of the Divisional Code Authorities.

[fol. 30] (3) Schedule A as attached to the Code recommended by the Administrator is approved with the understanding that any basic minimum rates not fixed therein may be approved or prescribed by the President at any time prior to the effective date of this Code by a Supplementary Executive Order.

(4) Because it is evident that attempts by those submitting Codes to interpret Section 7 (a) of the National

Industrial Recovery Act have led to confusion and misunderstanding, such interpretations should not be incorporated in Codes of Fair Competition. Therefore, paragraph (b) of Article V must be eliminated without, by this exclusion, indicating disapproval in any way of the joint statement of the Administrator and General Counsel of the National Recovery Administration, which has been attached to the Code as Schedule B and was incorporated by reference in said paragraph (b) of Article V.

(5) The exception to the definition of "employee" in Article II belongs in Article III. Accordingly, the words "Except members of the Executive, supervisory, technical and confidential personnel" are stricken from the third paragraph of Article II. These same words are inserted in the first paragraph of Article III after the words "no employee."

Franklin D. Roosevelt.

Approval recommended: Hugh S. Johnson, Administrator.

The White House, September 18, 1933.

[fol. 31] September 17, 1933.

General Hugh S. Johnson, Administrator, National Recovery Administration, Washington, D. C.

Dear Sir: I present herewith for your consideration and recommendation to the President the Code of Fair Competition for the Bituminous Coal Industry.

Efforts were under way to secure the cooperation of the Bituminous Coal operators prior to and in anticipation of the passage of the National Industrial Recovery Act.

The state of utter disorganization in the industry involving the prevalence of unfair competitive practices, particularly in the payment of low wages in order to permit of unreasonably low coal prices, furnished a good example of the effects of unrestrained competition in an industry capable of great overproduction in relation to existing consumer demands. In numerous ways the Bituminous Coal Industry has furnished more convincing evidence of the need for the integrating force of the National Industrial Recovery Act than any other industry in the nation.

The initial and immediate activity of the Administrator and the present writer after your appointment was an ef-

fort to bring about a greater coordination and cooperation between the operators in the different sections of the country in this industry and largely in response to this effort there came into being the Northern Coal Control Association and the Smokeless Appalachian Coal Association, representing almost all producers in the Appalachian coal area which produces approximately 70% of the national Bituminous coal tonnage. These associations join in presenting a Code of Fair Competition, this being a remarkable exhibition of cooperation among coal producers who have been engaged for a generation in bitter competitive operations. Other associations in various regions presented separate Codes as did certain groups of individual producers thus offered to the Administration the problem of harmonizing in some manner the divergent views represented in some twenty-eight different Codes.

This industry also presented the unique problem of one in which there was far-reaching organization of labor on an industrial basis, The United Mine Workers of America having contracts with many operators in many fields and claiming organization of workers in many other fields where no contractual relations existed.

The difficulty of reconciling all the conflicting elements in this situation can hardly be overemphasized. During the progress of discussion following the public hearings representatives of the Appalachian Associations requested the aid of the Administration in facilitating the negotiation of a contract between these associations and the United Mine Workers of America, and it was evident to the Administration that this step having been taken a successful conclusion to these negotiations was of the utmost importance in bringing about the submission of a code for the industry as a whole.

In the detailed report which will be prepared for your consideration all the steps taken and the problems involved will be given more adequate consideration. At the present [fol. 32] time in view of the urgent need for the recommendation and approval of the code which was finally adopted and submitted for approval on September 16 by representatives of approximately 95 per cent of the national tonnage, it is desirable to make recommendations only as to the following minor details:

1. There is a provision in Article VII, section 3, requiring each code authority to collect and combine any re-

port and other information required under the National Industrial Recovery Act. This should be supplemented by a definite obligation imposed upon the industry to furnish to government agencies such statistical information as the administrator may deem necessary for the purposes recited in Section 3-A of the National Industrial Recovery Act in the form of an Executive Order to be recommended to the President. An appropriate provision will be drafted to cover these requirements.

2. In Article VII, Section 4, provision is made for establishing an Industrial board, to consist of nine members designated by the several divisional code authorities and the six members of the divisional authorities who have been appointed by the President. It appears that the provision as written may unduly restrict the President in placing on the Industrial Board only his appointees to the divisional code authorities.

Accordingly, it is recommended that as a condition of approval the President reserve the right to name not more than three members either in substitution for, or in addition to the six presidential appointees made members of the Industrial Board by the present provision of Section 4, of Article VII.

3. Schedule A fixes basic minimum rates for various districts and parts thereof leaving the rates for certain producing areas to be either approved or prescribed by the President prior to the effective date of the code. In view of progress made since the submission of the code in determining those rates not fixed in schedule A attached to this report, and desire to make it plain that no rates as fixed in Schedule A as submitted have been changed.

The code as recommended complies in all respects with the pertinent provisions of Title I of the Act. The groups submitting the code impose no inequitable restrictions on admission to membership therein and were truly representative of the Bituminous Industry.

The code as recommended is not designated to promote monopolies or to eliminate small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of Title I of the National Industrial Recovery Act.

From evidence adduced during the hearing and all available information, it is believed that this code as now

proposed and revised represents an effective, practical solution for this industry, and its approval as herewith submitted is recommended.

Respectfully submitted,

K. M. Simpson, Deputy Administrator.

Approved: Hugh S. Johnson, Administrator.

[fol. 33] Code of Fair Competition for the Bituminous Coal Industry

Article I—Purposes

To effectuate the policies of Title I of the National Industrial Recovery Act, the following provisions are submitted as a Code of Fair Competition for the bituminous-coal industry and upon approval by the President shall be the standards of fair competition for this Industry.

Article II—Definitions

As used in this Code the term "Industry" as applied to the Bituminous Coal Industry means the production and original sale of all kinds of coal (except anthracite), lignite, and the production and original sale of coke other than byproduct coke.

The term "employer" includes any person employing labor in any phase of the industry.

The term "employee" includes all persons employed in the industry.

The term "Administrator" means the official designated by the President to administer the National Industrial Recovery Act.

Article III—Maximum Hours of Labor

No employee, except member of the executive, supervisory, clerical, technical and confidential personnel, shall be employed in excess of seven hours per day and five days per week, subject to the exceptions hereinafter stated.

Seven hours of labor shall constitute a day's work and this means seven hours work at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid on the day or the tonnage or other piecework basis; except in cases of accident which ten-

porarily necessitate longer hours for those required on account thereof; and also excepting that number of workers in each mine whose daily work includes the handling of man-trips and those required to remain on duty while men are entering and leaving the mine.

The following classes of mine workers are exempted from the provisions as to the maximum hours of work:

(a) All workers engaged in the transportation of coal shall work the additional time necessary to handle man-trips, and/or haulage animals, and all coal in transit, and shall be paid the regular hourly rates. Mine workers engaged in the dumping, handling and preparation of coal, and in the manufacture of coke, shall work the additional time necessary, not to exceed thirty minutes, to dump and prepare the coal delivered to the tipple each day and to complete the usual duties incidental to the operation of coke ovens, and shall be paid the regular hourly rates. This rule shall not encourage the working of such overtime except where it is necessary to take care of the conditions named.

[fol. 34] (b) Employees engaged at power houses, substations and pumps operating continuously for 24 hours daily are especially exempted from the seven-hour provision. Special exemptions of employees other than those named above are provided, by joint agreements negotiated in accordance with this code, which shall not provide for work in excess of 8 hours per day and 40 hours per week.[1]

Article IV—Minimum Rates of Pay

From April 1, 1934 to April 1, 1935 the basic minimum rate for inside skilled labor and the basic minimum rate for outside common labor shall be the rate hereinafter set forth in Schedule "A" for each district therein described for each such classification of labor, with the understanding that other classifications of employment will maintain their customary differentials above or below said basic minimum rates.

To secure the parity between minimum rates for day labor and minimum pay for work performed on a tonnage or other piece work basis, the latter shall be determined by the following increases over existing rates in all of the Dis-

[1] Amendment No. 1.—Approved Mar. 31, 1934.

tricts of Schedule "A" except as hereinafter expressly provided:

On the basis of the 2,000 pound ton, an increase of 10 cents per ton for pick mining; 8 cents per ton for machine mining; an increase of 1 cent per ton for cutting, and for all yardage and deadwork rates an increase of 9 percent.

In addition to the increases above provided the minimum rates for tonnage and other piecework in Districts B, G, H, J and J-1, shall be further increased by an amount sufficient to maintain the parity between pay for such tonnage and piece work and the basic minimum rates for day labor as prescribed for such Districts in Schedule "A".[2]

Article V—Conditions of Employment

(a) Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment approved or prescribed by the President.

(b) Except as otherwise hereinafter provided, all coal mined on a tonnage basis shall be weighed and the miner paid on the basis of 2,000 or 2,240 pound ton. The miners shall have the right to a check-weighman, of their own choosing, to inspect the weighing of coal: *Provided*, that where mines are not now equipped to weigh coal a reasonable time may be allowed to so equip such mines; and *pro-*
[fol. 35] *vided*, that in any case where rates of pay are based on any other method than on actual weights, the miners shall have the right to check the accuracy and fairness of the application of such methods, by representatives of their own choosing.

[2] Amendment No. 1.—Approved Mar. 31, 1934.

(c) The net amount of wages due shall be paid semi-monthly in lawful money or par-check at the option of operators. Any deductions from employees' pay, if not a matter of agreement, shall be in conformity with such general rules and regulations as the Administrator may prescribe for the purpose of preventing unfair deductions, or those which may in effect lower the rates of pay herein provided.

(d) Employees other than maintenance or supervisory men or those necessary to protect the property shall not be required as a condition of employment to live in homes rented from the employer.

(e) No employee shall be required as a condition of employment to trade at the store of the employer.

(f) No person under seventeen (17) years of age shall be employed inside any mine or in hazardous occupations outside any mine, provided, however, that where a state law provides a higher minimum age, the state law shall govern; no person under the age of sixteen (16) shall be employed in or about a mine.

(g) As soon as possible after the adoption of this Code, the National Recovery Administration shall undertake, through a designated committee or agency, an investigation for the purpose of reporting on or before December 31, 1933; upon (a) the practicability and cost (assuming the maintenance of existing rates of pay) of applying to bituminous coal mining a shorter work day and work week; (b) the effect of and advisability of revising wage differentials in the various divisions and districts of the industry and in the event of recommended change specification of the amount thereof; (c) the sales obtained for coal, or reasonably to be anticipated, up to the time of the report, for the purpose of determining whether wages and employment can be further increased or maintained without imposing undue burdens upon the industry.

On January 5, 1934, there shall be held a conference between representatives of employers and employees operating under this Code, together with representatives of the National Recovery Administration, for the purpose of determining what, if any, revisions may be desirable at that time of the wages, hours, and differentials, or any other requirements of this Code, on the basis of conditions then

existing and the report of representatives of the National Recovery Administration made as hereinbefore provided.

Unless revised by mutual agreement, as the result of said conference beginning January 5, 1934, the hours of work, minimum rates of pay, and wage differentials as set forth in this Code shall continue in effect until April 1, 1934.

[fol. 36] Article VI—Unfair Practices

Section 1. The selling of coal under a fair market price (necessary to carry out the purposes of the National Industrial Recovery Act, to pay the minimum rates herein established, and to furnish employment for labor) is hereby declared to be an unfair competitive practice and in violation of this Code. In order to determine the fair market price, agencies shall be established, as hereinafter provided, and sales of coal at any time at a price less than a fair market price determined and published, as hereinafter provided, shall create against any person selling at a lower price a prima facie presumption that such a person is engaged in destructive price cutting and unfair competition. It shall be proper in determining such fair market price to take into consideration, in addition to the matters above set forth, also competition with other coals, fuels, and forms of energy or heat production.

Section 2. The fair market prices of coal of any grade and character referred to in the next preceding section, subject to the power of review hereinafter stated shall be—

(a) The minimum prices for the various grades and sizes in the various consuming markets which may be established for future application by a marketing agency or by marketing agencies, of whatever form or howsoever constituted, now existing or hereafter created or organized, acting for coal producers truly representative of at least two thirds of the commercial tonnage of any coal district or group of districts, such minimum prices to be effective when and as announced as provided in Section 4 hereof.

(b) The minimum rates for the various grades and sizes in the various consuming markets, where no such marketing agency exists, which may be established for future application by the respective Code Authorities hereinafter set up, for their respective areas, after having given consideration to the various conditions and circumstances entering into

the sale of each group of districts it represents, such minimum prices to be effective when announced as provided in Section 4 hereof.

(c) As a basis for determining the fair market price to be announced and published, as provided in the two preceding clauses, the Code Authorities shall utilize the Classifications of coals made by such agencies as are referred to in clause (a) of this section, and shall classify the coals in said districts not sold by such agencies and also the coals in the districts referred to in clause (b) of this section, to which the various prices apply. Said Code Authorities shall, at all times, provide and keep open an office during business hours to which any coal producer in said districts and any representative of the Administrator may apply for information with respect to said classifications and prices.

(d) The term "marketing agency" or "agency" as used in this Article shall include any trade association of coal producers complying with the requirements of a marketing agency and exercising the functions thereof.

Section 3. The fair market prices established for future application under the provisions of Section 2 (a) shall be reported to said Code Authorities by any such marketing agencies in such manner as may be required by such Authorities.

Section 4. The fair market price of bituminous coal, established as aforesaid by such agencies and Code Authori- [fol. 37] ties shall be published within fifteen days after the effective date of this Code, after approval by the Presidential Member of the Code Authority (acting under the direction of the Administrator), who in his approval may permit a reduction or increase in said prices by action of said agencies or Authorities within the limits which he may prescribe, and thereafter shall be published whenever any changes is made therein, and not less frequently than one each month, and on the first of the month. Simultaneously with such publication, said fair market prices of bituminous coal shall be transmitted by the Code Authorities to the National Recovery Administrator for his further review and subsequent action.

Section 5. Both the records and the data of such marketing agencies and of said Code Authorities shall be open to

inspection and investigation by any agent of the Administractor whom he shall appoint for that purpose. Should such an agent of the Administrator disapprove of any changes proposed in any fair market prices from those previously approved by the Administrator as being in excess of any reductions or increases allowed in such approval, such changes shall not be made effective unless and until the Administrator approves them.

Section 6. The consignment of unordered coal, or the forwarding of coal which has not actually been sold, consigned to the producer or his agent, is a violation of this code; provided, however, that coal which has not actually been sold may be forwarded, consigned to the producer or his agent at rail or truck yards, tidewater ports, river ports, or lake ports, and-or docks beyond such ports, but such consignments shall be limited to cover:

(a) Bunker coal;

(b) Coal applicable against existing contracts;

(c) Coal for storage (other than in railroad cars) by the producer or his agent in rail or truck yards or on docks, wharves, or other yards for resale by the producer or his agent.

Section 7. The adjustment of claims with purchasers of coal in such manner as to grant secret allowances, secret rebates, or secret concessions creates price discrimination and is a violation of this Code.

Section 8. The prepayment of freight charges with intent or with the effect of granting a discriminatory credit allowance is a violation of this Code.

Section 9. The giving in any form of adjustments, allowances, discounts, credits, or refunds to purchasers or sellers of coal, for the purpose of altering retroactively a price previously agreed upon in such manner as to create price discrimination is a violation of this Code.

Section 10. The predating or the postdating of any invoice or contract for the purchase or sale of coal, except to conform to a bona fide agreement for the purchase or sale entered into on the predate is a violation of this Code.

Section 11. Terms of sale shall be strictly adhered to; and the payment or allowance of rebates, refunds, credits,

or unearned discounts, whether in the form of money or otherwise, or extending to certain purchasers services or privileges not extended to all purchasers under like terms and conditions, is a violation of this Code.

[fol. 38] Section 12. An attempt to purchase business, or obtain information concerning a competitor's business of gifts or bribes, is a violation of this Code.

Section 13. The intentional misrepresentation of analysis and-or sizes or the intentional making, causing or permitting to be made, or publishing, of any false, untrue, misleading, or deceptive, statement, by way of advertising, invoice, or otherwise, concerning the size, quality, character, nature, preparation or origin of any coal, bought or sold, is a violation of this Code.

Section 14. The unauthorized use, either in written or oral form, of trade marks, trade names, slogans, or advertising matter already adopted by a competitor, or deceptive approximation thereof, is a violation of this Code.

Section 15. Inducing or attempting to induce, by any means or device whatsoever, a breach of contract between a competitor and his customer during the term of such contract, is a violation of this Code.

Section 16. Nothing in the foregoing sections of this Article shall prevent any American producer from creating special prices for overseas exports.

Section 17. The splitting or dividing of commissions, brokers fees, or brokerage discounts, or otherwise in any manner through sham or indirection the use of brokerage commission or jobbers arrangements or sales agency for making discounts, allowances, or rebates, or prices other than those determined as provided in this Code, to any industrial consumer or to any retailer, or to others, shall be a violation of this Code.

Section 18. To sell to, or through, any broker, jobber, commission account, or sales agency, which is in fact an agent for an organization of retailers or industrial consumers, whereby they secure indirectly a discount, dividend, allowance or rebates, or a price other than that determined in this Code shall be a violation of this Code.

Article VII—Administration

Section 1. For the purposes of Administration of this Code, the Bituminous Coal Industry is hereby divided into five divisions as follows:

Division No. I—Pennsylvania, Ohio, Lower Peninsula of Michigan, Maryland, West Virginia, Kentucky, Northern Tennessee, (including all counties not included within Division No. III), Virginia and North Carolina.

Division No. II—Iowa, Indiana, and Illinois.

Division No. III—Alabama, Southern Tennessee, (including Marion, Grundy, Sequatchie, White, Hamilton, Bledsoe and Rhea Counties); and Georgia.

Division No. IV—Missouri, Kansas, Arkansas, Oklahoma, and Texas.

Division No. V—New Mexico, Colorado, Utah, Wyoming, North Dakota, South Dakota, Montana, Idaho, Washington, Oregon, California, Nevada and Arizona.

In each of the foregoing five divisions, subdivisions may be established, as hereinafter provided.

Section 2. Divisional Code Authorities.—For each of [fol. 39] the foregoing divisions there shall be established within ten days after the effective date hereof, or within such further time as may be permitted by the Administrator, a Divisional Code Authority, or Subdivisional Code Authorities for the administration of this Code within such division, either for the division as a unit, or for subdivisions thereof, respectively, as may be determined. All the members of a Code Authority, except one (without vote and to be appointed by the President) shall be selected by an association or associations, or a committee of coal producers within the division or subdivision which shall be truly representative of ths industry therein and impose no inequitable restrictions on admission to membership. A full report of any such action taken to establish a Code Authority shall be made to the Administrator and shall become effective upon approval by him. A subdivision shall consist of a geographical area within which all coal producers shall be entitled to membership in the association or committee establishing the Code Authority. The Administrator shall have power to limit the number of subdivisions within a division and to determine any controversy arising in the establishment of such a Code Authority, and his decision shall be conclusive as to com-

pliance with the requirements of this Section and of the National Industrial Recovery Act in the initial establishment of such a Code Authority.

In the event that Subdivisional Code Authorities are established within a division, such Subdivisional Code Authorities shall establish a Divisional Code Authority to exercise the functions hereinafter provided for a Divisional Code Authority and any other functions which may be conferred upon the Divisional Code Authority by the Subdivisional Code Authorities, all in conformity with any rules and regulations prescribed by the Administrator. One member of a Divisional Code Authority, without vote, shall be appointed by the President.

A Code Authority shall administer this Code in its Division or Subdivision and shall have the duties and exercises the powers which are conferred upon it in this article and in Article VI of this Code, and shall have authority to adopt appropriate by-laws, rules and regulations for the exercise of its functions.

Marketing agencies or trade associations may be established or maintained within any division or subdivision by a voluntary association of producers within any producing district therein, as such district may be defined by the Code Authority and function under such general rules and regulations as may be prescribed by the Code Authority, with the approval of the Administrator, for the purpose of preventing any unfair practices, as defined in Article VI of this Code.

Section 3. Each Code Authority shall collect and compile any reports and other information required under the National Industrial Recovery Act; and in investigations of any complaint of unfair practices the Presidential members of a Code Authority shall have power to require reports from, and shall be given access to inspect the books and records of producers within the jurisdiction of such Code Authority to the extent he may deem necessary for the determination of the validity of the complaint. All coal producers subject to the Code shall furnish to any government agency or agencies designated by the Administrator such statistical information as the Administrator may, from time to time, deem necessary for the purposes recited in Section 3 (a) of the National Industrial Recovery Act; and any reports and other information collected and

compiled by a Code Authority, as heretofore provided, shall be transmitted to such government agencies, as the [fol. 40] Administrator may direct.

The expense of administering this Code by a Divisional (or Subdivisional) Code Authority shall be borne by those subject to such Code Authority, each paying his proportionate share, as assessed, computed on a tonnage basis, in accordance with regulations prescribed by the Code Authority with the approval of the Administrator.

Section 4. Industrial Board.—There shall be established within ten days after the creation of the Divisional Code Authority a National Bituminous Coal Industrial Board, consisting of four members designated by the Divisional Code Authority of Division No. I, two members designated by the Divisional Code Authority of Division No. II, one member each designated by the Divisional Code Authorities of Divisions No. III, IV, and V and the five members of the Divisional Code Authorities who have been appointed by the President. The President may appoint not more than three members of the Industrial Board, in addition to, or in substitution for one or more of, the aforesaid five members of the Divisional Code Authorities. This Board shall have the duties and exercise the powers conferred upon it in this Code, or any revisions thereof and particularly shall meet from time to time at the call of the Administrator, who shall be ex officio Chairman thereof, to consider and to make recommendations to the Divisional Code Authorities and to the President as to any amendments of this Code, or other measures which may stabilize and improve the conditions of the industry and promote the public interest therein.

Section 5. Labor Relations.—(a) Any controversy concerning hours, wages, and conditions of employment, or compliance with the provisions of Article V of this Code, between employers and employees who are organized or associated for collective action shall, if possible, be adjusted by conference and negotiation between duly designated representatives of employers and such employees, meeting either in a mine conference or district conference or divisional conference, as the machinery for such conference may be established by agreement of the parties thereto; and it shall be the duty of employers and employees to exert every

reasonable effort to establish such controversies wherever possible.

(b) Any such controversy which cannot be settled in the manner so provided and which threatens to interrupt, or has interrupted, or is impairing the efficient operation of any mine or mines to such an extent as to restrain interstate commerce in the products thereof, shall be referred to the appropriate Bituminous Coal Labor Board, established as hereinafter provided, and the decision of said Board shall be accepted by the parties to the controversy as effective for a provisional period of not longer than six months, to be fixed by the Board.

(c) During the consideration of any such controversy either by the agreed machinery of adjustment, or by the Bituminous Coal Labor Board, neither party to the controversy shall change the conditions out of which the controversy arose, or utilize any coercive or retaliatory measures to compel the other party to accede to its demands.

(d) If any such controversy shall involve or depend upon the determination of who are the representatives of the employees chosen as provided in Section 7 (a) of the National Industrial Recovery Act, the appropriate Bituminous Coal Labor Board, through any agent or agency it may select, shall have the power to determine the questions by [fol. 41] an investigation and, if necessary, by a secret ballot taken under its direction.

(e) A Bituminous Coal Labor Board shall be appointed by the President for each Division, except the powers herein conferred upon it, which shall consist of three members, one to be selected from nominations submitted by organizations of employees within such Division; one to be selected from nominations by the Divisional Code Authority and one who shall be wholly impartial and disinterested representative of the President. The expenses of such board shall be met by equal contributions from the employers and employees nominating members, the amount and method of collecting which shall be determined by regulations prescribed by the President.

(f) There shall be a National Bituminous Coal Labor Board composed of the members of the six divisional labor boards which may be convened upon call of the Administrator in the event that—

1. A controversy involves employers and employees of more than one division, or

2. The decision of a divisional labor board affects operating conditions of more than one division either directly or because of its effect upon competitive marketing, or

3. In the opinion of the Administrator the decision of a divisional labor board involves the application of a policy affecting the general public, or the welfare of the industry as a whole.

The National Bituminous Coal Labor Board may exercise all the powers conferred upon a divisional labor board, either in giving original consideration to a controversy, or in reviewing the decision of a divisional labor board, which may be either affirmed, set aside and-or modified.

Article VIII—Safety

Employers and employees shall cooperate in maintaining safe conditions of operation in compliance with the applicable requirements of State laws or regulations in conformity therewith.

Article IX—Amendments

Any Code Authority may propose amendments to this Code from time to time effective generally or as to the area within its jurisdiction which, after submission to any other Code Authority affected thereby (which shall include the divisional Code Authority in case of an amendment proposed by a subdivisional Code Authority), may be recommended by the Administrator for the approval of the President.

Article X

This Code and all the provisions thereof are expressly made subject to the right of the President, in accordance with the provision of subsection (b) of Section 10 of the National Industrial Recovery Act, from time to time to cancel or modify any order, approval, license, rule, or regulation issued under Title I of said Act and specifically, but without limitations, to the right of the President to cancel or modify his approval of this Code or any conditions imposed by him upon his approval thereof.

[fol. 42] Article XI—Effective Date and Termination

This Code shall become effective on the second Monday following its approval by the President, and shall continue in effect until April 1, 1934, and thereafter in the absence of the exercise of the power reserved to the President in Article X, subject to the exercise of the option, after 30 days' notice to the Administrator, by any coal producer to withdraw his consent after April 1, 1934, to the further enforcement of the Code as a Code to which he has voluntarily given his consent.

Approved Code No. 24.
Registry No. 702-45.

[fol. 43] SCHEDULE A[1]

Basic Minimum Rates

	Basic Minimum Rates			
	Minimum inside skilled labor		Minimum outside skilled labor	
	Per day	Per hour	Per day	Per hour
District A				
Pennsylvania	$5.00	$0.71 4/10	$4.00	$0.57 1/10
Ohio	5.00	.71 4/10	4.00	.57 1/10
Lower Peninsula or Michigan	5.00	.71 4/10	4.00	.57 1/10
Panhandle District of West Virginia [1]	5.00	.71 4/10	4.00	.57 1/10
District B				
Northern West Virginia [2]	5.00	.71 4/10	4.00	.57 1/10
District C				
Southern West Virginia [3]	4.60	.65 7/10	3.60	.51 4/10
Eastern Kentucky [4]	4.60	.65 7/10	3.60	.51 4/10
Upper Potomac District of W. Va.[5]	4.60	.65 7/10	3.60	.51 4/10
Maryland	4.60	.65 7/10	3.60	.51 4/10
Virginia	4.60	.65 7/10	3.60	.51 4/10
Northern Tennessee [6]	4.60	.65 7/10	3.60	.51 4/10
District D				
Indiana	4.57½	.65 5/10	4.20	.60
District E				
Illinois	5.00	.71 4/10	4.00	.57 1/10
District F				
Iowa [7]	4.70	.67 1/10	4.00	.57 1/10
Wayne and Appanoose Counties, Iowa	4.56	.65 1/10	4.00	.57 1/10
District G [8]				
Missouri, Kansas, Arkansas, and Oklahoma, shaft, drift or slope mines in States	4.35	.62 1/10	3.75	.53 6/10
Shaft, drift, and slope mines in Missouri, Kansas, Arkansas, and Oklahoma	4.00	.57 1/10	3.53	.50 4/10
District H				
Western Kentucky [8]	4.60	.65 7/10	3.75	.53 6/10

SCHEDULE A—Continued

Basic Minimum Rates

	Basic Minimum Rates			
	Minimum inside skilled labor		Minimum outside skilled labor	
	Per day	Per hour	Per day	Per hour
District J				
Alabama	3.80	.54 2/10	2.80	.40
Georgia	3.80	.54 2/10	2.80	.40
Southern Tennessee, Hamilton and Rhea Counties	3.80	.54 2/10	2.80	.40
District J-1				
Marion, Grundy, Sequatchie, White, Van Buren, Warren, and Bledsoe Counties in the State of Tennessee	4.24	.60 4/10	3.24	.46 2/10
District K				
New Mexico	5.10	.72 8/10	4.10	.58 6/10
Southern Colorado [9]	5.10	.72 8/10	4.10	.58 6/10
District L				
Northern Colorado [10]	5.25	.75	4.25	.60 7/10
District M				
Utah	5.44	.77 7/10	4.48	.64
District N				
Southern Wyoming	5.42	.77 5/10	4.44	.63 5/10
Northern Wyoming	5.42	.77 5/10	4.54	.64 9/10
District O				
Montana	5.63	.80 5/10	4.82	.68 9/10
District P				
Washington	5.40	.77 1/10	4.00	.57 1/10
District Q				
North Dakota	4.50	.64 3/10	3.70	.52 9/10
South Dakota	4.50	.64 3/10	3.70	.52 9/10

[fol. 44]

[1] Includes Hancock, Brooke, Ohio and Marshall Counties.

[2] Includes Monogalia, Marion, Harrison, Taylor, Lewis, Barbour, Gilmer, Upshur, Randolph, Braxton, Preston, and Webster Counties and those mines in Nicholas County served by the B. & O. R. R.

[3] Incluesd all mines in counties in West Virginia not named under District A and B and the Upper Potomac District.

[4] Includes all mines in Kentucky located east of a north and south line drawn along the Western boundary of the City of Louisville.

[5] Includes Grant, Mineral and Tucker Counties.

[6] Includes all Counties in Tennessee not named under Southern Tennessee in District J and J-1.

[7] Excludes Wayne and Appanoose Counties.

[8] Includes all mines in Kentucky west of a north and south line drawn along the western boundary of the City of Louisville.

[9] Includes all Counties in Colorado not named under District L.

[10] Includes Jackson, Larimer, Weld, Boulder, Adams, Arapahoe, El Paso, Douglas, Elbert, and Jefferson Counties.

Note: Differences between districts in the foregoing minimum rates are not to be considered as fixing permanent wage differentials or establishing precedents for future wage scales.

[2] Amendment No. 1—Approved Apr. 22, 1934.

[3] Amendment No. 3—Approved June 4, 1934.

[fol. 45] In view of the differentials hereby accorded District J, pending further order there shall be no sales by operators of said District into the normal consuming markets of another District which is subject to higher rates of pay, at any prices for coal of comparable grade and quality, less than the price for such coal in said market charged by such other District, and there shall be no destructive invasion of such other consuming markets and; in the absence of satisfactory agreements governing this matter, the determination of the Administrator on complaint of any such destructive invasion shall be conclusive. The requirement that the minimum rates for tonnage and other piecework in certain Districts should be further increased shall be modified so as to read as follows:

"In addition to the increases above provided the minimum rates for tonnage and other piecework in Districts B, G, H, J, and J-1, shall be further increased, if necessary, by an amount sufficient to maintain the customary relationship in the industry between pay for such tonnage and piecework and the basic minimum rates for day labor as prescribed for such districts in New Schedule A", that requirement as to increases in District B, shall be satisfied pending further order, by an increase per 2,000 pound ton for said District of two and one-half (2½) cents in loading rates and one-half (½) cent in cutting rate.[2]

In view of the differentials accorded District G, and in view of the situation existing in District H, pending further order there shall be no sales by operators of said Districts into the normal consuming markets of another District which is subject to higher rates of pay, at any prices for coal of comparable grade and quality, less than the price for such coal in said market charged by such other District, and there shall be no destructive invasion of such other consuming markets and; in the absence of satisfactory agreements governing this matter, the determination of the Administrator on complaint of any such destructive invasion shall be conclusive.[3]

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[2] Amendment No. 2—Approved Apr. 22, 1934.

[3] Amendment No. 3—Approved June 4, 1934.

[fol. 46] PLAINTIFF'S EXHIBIT No. 5

United Mine Workers of America

Charleston, W. Va.

September 30, 1933.

Mr. Geo. W. St. Clair, President, Jewell Ridge Coal Corporation, Jewell Ridge, Virginia.

MY DEAR SIR:

It is understood that your mines are in the Pocahontas-Tug River Coal field and the loading rates are 35.7¢ per ton. It is agreed between us that the Jewell Ridge Coal Corporation will increase the rates now being paid by it for dead work 20%. The rates for dead work in the Pocahontas-Tug River field shall not apply to your mines.

It is further agreed that the cutting rate with the short-wall machine shall be increased to 6½¢ per ton and that the cutting rate with the arcwall machine shall be 70% of 6½¢ if done by piece work.

It is distinctly understood this agreement sets no precedent for the establishment of future wage rates for dead work.

This agreement is made in the spirit of fairness with the knowledge that collective bargaining must always be on a basis of constructive co-operation between the company and the United Mine Workers of America.

Very truly yours, (Signature) Van A. Bittner.

[fol. 47] PLAINTIFF'S EXHIBIT No. 11

United Mine Workers of America

Welch, West Virginia.

April 22, 1937.

Mr. Huston St. Clair—Vice-Pres., Jewell Ridge Coal Corporation, Bluefield, West Virginia.

DEAR SIR:

Enclosed you will find the letter which you sent to me for Mr. Blizzard's and Mr. Bittner's signatures.

Yours truly, Jesse Aquino.

J.A./ms.

[fol. 48] PLAINTIFF'S EXHIBIT No. 11-a

Jewell Ridge Coal Corporation

Law & Commerce Bldg.

Bluefield, W. Va.

April 15, 1937.

Mr. Jesse Aquino, Box 311, Welch, W. Va.

DEAR SIR:

The agreement made by and between the Jewell Ridge Coal Corporation and the United Mine Workers of America, as evidenced by a letter of Mr. Van A. Bittner to Mr. George W. St. Clair in September, 1933, is hereby continued in effect.

It is agreed that the rates paid by the Jewell Ridge Coal Corporation at Jewell Ridge at the termination of the contract which expired March 31, 1937, will be continued and the rate of increase agreed to in the joint Appalachian Conference will be applied so that the new rates will be as follows:

Machine Loading	$ .597
Where machine cuts on pillar loading rate, including dead work	.751
Pick rate where machine does not undercut or overcut, tonnage rate including dead work	.844
Machine cutting, Shortwall machine	.095
The method of payment of yardage will be continued, with the exception of increasing the rate from $.648 to	.070

Will you please signify your acceptance of this agreement by signing and returning one of these copies.

Yours very truly, Jewell Ridge Coal Corporation, Huston St. Clair, Vice-Pres., H. E. Ewing, Supt.

Van A. Bittner, President. W. M. Blizzard, Vice-Pres. Jesse Aquino. Wm. Lester.

[fol. 49] PLAINTIFF'S EXHIBIT No. 12

Agreements by and between the Jewell Ridge Coal Corporation, Jewell Valley Mine, and the United Mine Workers of America, Local Union No. 7327, District 17, and the International Union, effective September 16, 1937, until March 31, 1939, inclusive:

The Agreements known as the Pocahontas-Tug River Agreements and entitled Appalachian and Pocahontas-Tug River Agreements by and between Pocahontas Operators Association and the United Mine Workers of America, District 17, and the International Union, effective April 1, 1937 until March 31, 1939, inclusive, apply at the Jewell Valley Mine, with the following exceptions only:

First: The Shortwall machine rate shall be $0.085 per net ton.

Second: The Pick rate shall be $0.682.

Third: The usual draw slate in excess of 4 inches shall be paid for at the rate of $0.079. No deductions shall be made for impurities in the seam or in the bottom.

Fourth: Where gob is required to be loaded out by the company the coal miner shall be compensated by means of a gob check for each car loaded. The value of the gob check shall equal one hour's time, and upon presentation at the office credit of $0.80 will be given the miner for each check presented. Possession of the gob check shall be evidence that the foreman required the miner to load a car of gob.

The above four agreements, and otherwise the Pocahontas-Tug River Agreements, constitute the total agreements between the United Mine Workers of America and the Jewell Ridge Coal Corporation, and are effective from September 16, 1937 until March 31, 1939, inclusive.

(Signed) Van A. Bittner, William Blizzard, United Mine Workers of America. Wm. Patterson, J. H. Shepherd, Roy Herrel, Jesse Aquino, Wm. Lester.

Jewell Ridge Coal Corporation, Huston St. Clair, Vice President,. (Signed) Huston St. Clair, H. E. Ewing, Genl. Superintendent (Signed) H. E. Ewing.

[fol. 50] PLAINTIFF EXHIBIT No. 13

Jewell Ridge, Virginia, September 12, 1941.

The agreement made by and between the Jewell Ridge Coal Corporation and the United Mine Workers of America, as evidenced by a letter of Mr. Van A. Bittner to Mr. George W. St. Clair in September, 1933, is hereby continued in effect.

The Southern Wage Agreement and the Pocahontas-Tug River Wage agreements will apply at the Jewell Ridge Mine except as follows:

It is agreed that the Jewell Ridge Coal Corporation will pay, effective April 1, 1941, to March 31, 1943, inclusive, the following wage rates differing from the Pocahontas-Tug River rates:

First: Where machine cuts on pillars, loading rate including dead work, will be (except in barrier pillars or similar blocks, the basic rate will apply during development) $0.861

Second: Pick rate where machine does not undercut, overcut or centercut, tonnage rate including dead work $0.964

Third: Machine cutting, shortwall machine $0.105

Fourth: The method of payment of yardage will be continued, with the exception of increasing the rate from .070 to $0.0805

Fifth: Rib yardage in narrow work or headings, single shift, shall be paid for at the rate of $0.410

Sixth: Rib yardage in narrow work or headings, double shift, shall be paid for at the rate of $0.540

In witness whereof each of the parties hereto, pursuant to proper authority, has caused this agreement to be signed.

Jewell Ridge Coal Corporation, Huston St. Clair, President, L. C. Johnson, General Manager.

United Mine Workers of America. Charles Payne, William M. Lester, J. H. Shepherd, H. H. Hamm, Walter Strouth, Carl Altizer, H. D. Hampton.

[fol. 51] PLAINTIFF'S EXHIBIT No. 14

Jewell Ridge, Virginia

September 12, 1941.

The agreements known as the Southern Wage Agreement and the Pocahontas-Tug River Agreement, by and between the Pocahontas Operators Association and the United Mine Workers of America, District 17, and the International Union, effective April 1, 1941 until March 31, 1941, inclusive, apply at the Jewell Valley Mine, with the following exceptions:

First: The Shortwall machine rate shall be $0.095 per net ton.

Second: The pick rate shall be $0.802.

Third: The usual draw slate in excess of 4 inches shall be paid for at the rate of .0908 per inch per lineal yard. No deductions shall be made for impurities in the seam or in the bottom.

The above agreements constitute the total agreements between the United Mine Workers of America and the Jewell Ridge Coal Corporation, and are effective April 1, 1941, until March 31, 1943, inclusive.

Jewell Ridge Coal Corporation, Huston St. Clair, President, L. C. Johnson, Gen. Mgr.

United Mine Workers of America. Charles Payne, William M. Lester, J. H. Shepherd, J. A. White, T. E. McDonald, Paul Sykes.

[fol. 52] PLAINTIFF'S EXHIBIT No. 15

United Mine Workers of America

Mine Workers Building, 142½ Summers St., Charleston, W. Va.

January 26, 1942.

Jewell Ridge Coal Corporation, Jewell Ridge, Virginia

GENTLEMEN:

This is to advise that on January 13, 1942, the jurisdiction of Local Union 6167 was transferred from District 17 to District 28.

All business transactions carried on between your company and the United Mine Workers of America will be with District 28 instead of District 17, as of January 13, 1942.

Yours very truly, Geo. J. Tiller, Secretary-Treasurer, District 17, U. M. W. of A.

GJT:w.

Attention Mr. Johnson.

[fol. 53] PLAINTIFF'S EXHIBIT No. 16

Distances of Man Trip Stations from the Portal at Jewell Ridge Mine

No. 4 Mine	4,250 ft.
Lower Middle Creek, where men catch mantrips	6,050 ft.
Upper Middle Creek, where men catch mantrips	9,850 ft.
Jones Fork Driftmount, where men catch mantrips	12,630 ft.
Dispatcher's Office, where men catch mantrips	15,280 ft.
2 North Telephone, where men catch mantrips	17,980 ft.
Bearwallow Drift, where men catch mantrips	18,460 ft.
Parallel Drift, where men catch mantrips and get off mantrips	
5 Right Section, where mantrip stops	23,960 ft.
Parallel Man Station (#1) mantrip stops	23,460 ft.
Parallel Man station (#2) mantrip stops	24,060 ft.
Parallel—14 East, where parties visited	25,460 ft.
Parallel—10 East, where parties visited	24,960 ft.
Bearwallow Man Station	23,660 ft.
2 North Man Station	20,580 ft.
1 North Man Station	19,480 ft.
Gravel Branch Man Station	19,180 ft.

[fol. 54] PLAINTIFF'S EXHIBIT No. 18

United Mine Workers Journal

August 15, 1933

President Lewis' Brief Supporting General Coal Code

The present occasion is one which the United Mine Workers of America have been looking forward to and struggling hopefully towards for the past seven years.

During this period our membership has given freely of their vanishing earnings, and our officers have labored without ceasing to rescue the industry from chaos, and by governmental intervention, to restore it to an orderly, prosperous basis of operations.

For these reasons when the National Recovery Act was projected, we put aside our own special measures, and gave ourselves without reservations to the enactment of this measure not only because of its bearing upon the problems of the coal industry, but also, because it embodied the main hope in the dark days of last spring for the salvation and democratization of our entire economic system.

We believe now that the inauguration of these proceedings today may be made the beginning of the economic rehabilitation of the bituminous coal-mining industry. We trust also that the outcome of our deliberations will mean the restoration of the economic and civil rights of our membership, and the assurance to them of the opportunity to labor at a wage sufficient for the proper support of themselves and their families.

We welcome this meeting also as affording the adoption of an arrangement which will enable our organization to cooperate with bituminous coal operators to the fullest possible extent in applying a program for the stable enlightened progress of the industry, and for rescuing bituminous coal mining communities from economic insolvency and despair. We hope that as the result of our cooperative efforts the workers and other residents of the coal field may have their purchasing power restored and become an important and vital force in contributing to the complete success of President Roosevelt's recovery plans.

The United Mine Workers of America, in supplying a uniform, competitive labor cost for bituminous coal mines, has been the only stabilizing force which the industry has ever had. So far as its efforts were weakened during the period 1925-1932, by attacks made upon it or by the indefensible repudiation of agreements with it, its constructive influence has been supplanted by the law of the jungle which has known neither humanity, profits, nor investors.

The deplorable and diseased economic conditions which immediately developed within the industry, and which the passing years served to intensify, have now so long prevailed that they are practically known to all men. It is

now recognized by the most disinterested and authoritative opinion, both within and without involving the cooperation and supervision of the Federal Government as an umpire to pass upon principles and practices and to insure a planned, coordinated and prosperous basis of procedure.

It will not be necessary for me, therefore, to take the time or burden the record of these proceedings, with an analysis of the existing conditions which prevail in the bituminous coal mining industry. They have been the sub- [fol. 55] ject of numerous investigations by Governmental agencies, the last of which—a subcommittee of the Senate Committee on Mines and Mining—after prolonged hearings on a bill to create a bituminous coal commission, made its report and recommendations as recently as July 7, 1932. The reports of this special subcommittee also took cognizance of and reviewed the results of previous Governmental inquiries. In lieu of any extended exposition by myself, therefore, of conditions which prevail and have prevailed within the industry, I shall submit exhibits as follows:

1 and 2. Report of the subcommittee of the Senate Committee on Mines and Mining on the Bill, S. 2935, To Create a Bituminous Coal Commission (72nd Cong., 2nd Sessions); Views of Mr. Davis, July 7, 1932, and Views of Senator Clark Hayden of Arizona.

3. Section from the Joint Report of the International Officers of the United Mine Workers of America entitled "The Economic Aspects of Coal," submitted to the 32nd Consecutive Constitutional Convention of the United Mine Workers of America at Indianapolis, Indiana, January 26, 1932.

4. Statement of the President, United Mine Workers of America, before a subcommittee of the Senate Committee on Manufactures, on A Bill to Establish a National Economic Council, December 4, 1931; and

5. Statement of President, United Mine Workers of America, to the Finance Committee of the United States Senate on Investigation of Economic Problems, February 17, 1933.

The Attitude of the United Mine Workers of America.

The members of our organization have absorbed the new spirit which has been responsible for the National Recovery

Act with a deep crusading consciousness. Their collective strength and faith have been renewed. Their attitude is one of the most sincere and constructive copartnership. They know that the future will yield great rewards to all of us in the coal industry if we lay aside old conceptions and prejudices, and approach each other in the spirit of the Recovery Act, which says, Come let us reason together, and in the light of past experience and present conditions, let us work out a system of control and procedure for the bituminous coal mining industry that will recognize justly all those directly concerned as well as the public interest.

It was in this spirit that the Code between our organization and the representative operators' group with which we met, was drawn. Both groups of interests desired a code which would be a code of fair competition in the real sense of the term—one that would recognize fundamental needs courageously and evolve a measure that would boldly deal with them. We have attempted to form a program for the industry which would be comprehensive and just to all interests involved, and which for this reason would be worthy of acceptance by all as an assured basis of industrial copartnership and well-being for the industry and our country in the future. Fundamental needs are squarely met. No half-way expedients or temporizing proposals were given favorable consideration. Both parties to our code conferences endeavored to proceed in the same spirit which the President expressed on June 16, 1933, in outlining the policy of the Administration under the National Industrial Recovery Act when he said:

> "Many good men voted this new charter with misgivings. I had part in the great cooperation of 1917 [fol. 56] and 1918 and it is my faith that we can count on our industry once more to join in our general purpose to lift this new threat and to do it without taking any advantage of the public trust which has this day been reposed without stint in the good faith and high purpose of American business."

Procedure of the United Mine Workers

It has been our interpretation of the National Recovery Act from its earliest stages, that it assumed, so far as wages and working conditions of workers are concerned, that the real purposes of the law would be best attained by

collective agreements between representatives of organizations of employes and representatives of employes who had associated themselves together for the purpose of formulating a code of fair competition for an industry. In other words, provisions as to wages and working conditions for a proposed code could not be submitted by employers, or become the subject of investigation and determination by the Recovery Administration, until every opportunity had been given to employers and employes to meet and agree upon maximum hours of labor, minimum rates, and other necessary conditions of employment. I refer to Subsection b of Section 7 of the Act which I shall read.

> The President shall, so far as practicable, afford every opportunity to employers and employes in any trade or industry or subdivision thereof with respect to which the conditions referred to in clauses (1) and (2) of subsection (a) prevail, to establish by mutual agreement the standards as to the maximum hours of labor, minimum rates of pay, and such other conditions of employment as may be necessary in such trade or industry or subdivision thereof to effectuate the policy of this title; and the standards established in such agreements, when approved by the President, shall have the same effect as a code of fair competition, approved by the President under Subsection (a) of Section 3.

This provision is a necessary corollary to Section 7 (a) of the Act which guarantees to employes the right to organize and bargain collectively through chosen representatives.

I may also add—as to this point—that although we realize that Section 7 (a) of the Act directly confers the right to employes to organize and bargain collectively through chosen representatives, we fully appreciate that before the adoption of a code, it does not impose any obligation on the Government to require the recognition by employers of organizations of employes.

On the other hand, the implications of the Act itself are clear and explicit as to the obligations of employers. The Act, after giving employes the right to organize unmolested for the purposes of collective bargaining, provides as a basis for attaining its objectives, a copartnership between

employers and employes. It, therefore, inevitably follows, as night follows the day, that the Act assumes that employers will freely recognize and deal with representatives of employes. The only possible question which could be legitimately raised by employers would be as to the credentials of employe representatives—whether they really represented employes. Once satisfied as to this point, it is the legal obligation of employers under the Act, to accept and to deal with representatives of employes in the spirit [fol. 57] of cooperation which the Act assumes.

Refusal of employers to do this, involves two deplorable conclusions: (1) that employers are refusing to abide by the spirit and letter of the law, and (2) by this refusal, they are not only obstructing the fundamental purposes of the Act to accelerate economic recovery, but what is more serious, they are promoting discord and dislocations, for the reason that they leave no alternative to employes, but the undesirable one, of using their collective strength to force recognition of their organization and its representatives.

At any rate, in the light of this interpretation of the Act, which I think is a sound and correct one, we extended our organization in all coal fields in order to be in a position to deal collectively with bituminous coal operators on a national basis, for the reason that we knew from long experience in the industry that it could only be stabilized and restored to a normal condition through a code which would be national in its scope and its provisions.

The operators with whom we met in conference, took the same attitude as the United Mine Workers toward the Recovery Act and the problems of the bituminous coal industry. They accepted labor as a co-partner in the industry. The union of the mine workers was recognized by the operators. The labor principles and standards of the code were arrived at through collective bargaining between representatives of the operators and of the United Mine Workers of America. This was in accordance with the Recovery Act and as it should be in all codes submitted where facilities for collective bargaining between employers and employes exist.

Boards of Administration

The Administration of our Code when approved is placed in the hands of the Bituminous Coal Industry Board of five members, two persons as representatives of the operators

to be designated by the Industrial Advisory Board of the National Recovery Administration: and two persons as the representatives of labor to be designated by the Labor Industrial Board, and a chairman to be named by the Administrator of the National Industrial Recovery Act.

While the code limits the powers of the general administration board to supervision, it is our opinion that there should be added to the board the function of economic planning for the industry.

The Standards of the Code as to Minimum Rates of Pay

The provisions of our code as to minimum rates of pay, conditions of employment and as to district agreements and differentials are as follows:

Standards as to Minimum Rates of Pay and Working Conditions

The following is submitted as the standard minimum rates of pay to prevail throughout the bituminous coal mining industry:

The minimum pay for track layers, bottom cagers, drivers, trip riders, grippers, water haulers, machine haulers and timbermen shall be $5.00 per day. Helpers and other inside day labor shall be paid at the rate of $4.75 per day. Exceptions to these minimum rates are trappers, spraggers, switch throwers, oilers and couplers. The existing amounts [fol. 58] by which wages in the higher priced classes, including strip mining, exceed the classes named shall be maintained.

Outside workers shall be paid a minimum day wage of $4.00 except for slate and sulphur pickers. Outside workers are those workers employed incidental to plant operation. The existing amounts by which wages in the higher priced classes named shall be maintained.

It is recognized that within coal producing districts wages and working conditions for mine workers shall conform to the minimum rates of pay herein established and be uniform within each district; that they shall likewise be uniform as between districts to the extent necessary to provide fair competitive production costs; and to that end each of the coal districts is directed to submit within fifteen days from the effective date of this code for the consideration and approval of the National Industrial Recovery Ad-

ministration its supplemental code setting forth its minimum rates of pay to mine workers employed on a tonnage basis in pick mining, hand loading, undercutting, solid shooting; and also mine workers employed in strip mining and mechanical mining, to conform to the basic rate of $5.00 for inside labor, and where the mine workers in any such district are organized and willing to bargain collectively for such wages and working conditions, to report what, if any, such mutual agreements have been made.

Minimum rates are subject to the following adjustments:

(a) In those districts south of the Ohio River and east of the Mississippi River, and in the Morgantown and Fairmont districts of West Virginia, the minimum day rates may specify a differential below the basic rates of not to exceed five per cent.

(b) It is recognized that in the states of Oklahoma, Arkansas and Texas special conditions exist, and authority is given for joint agreement between the representatives of the mine workers and the operators on the question of proper differentials.

(c) Existing higher differentials established in Colorado, Utah, Wyoming, Montana and Washington during past years by reason of higher living costs shall not be disturbed.

Standards as to Other Conditions of Employment

A: It is recognized (1) that employes shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employe and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.

B: Except as hereinafter provided, all coal mined on a tonnage basis shall be weighed and paid for on the basis

of 2,000 pounds ton. The miners shall have the right to a checkweighman, of their own choosing, to inspect the weighing of coal; Provided, that where mines are not now equipped to weigh coal a reasonable time will be allowed to so equip such mines; and provided, that in any case where on account of physical conditions and mutual agreement [fol. 59] wages are based on measure or other method than on actual weights, the miners shall have the right to check the accuracy and fairness of such method than and by a representative of their own choosing.

C: Wages shall be paid semi-monthly in lawful money or par check at the option of the operators. Deductions may be made from the pay of employes for rentals, house coal, powder, mine supplies, store accounts, dues to the labor organization of employes, and for other legitimate items; but no deduction or discount shall in effect lower the actual rates of pay provided by the code.

D: Employes other than maintenance or supervisory men or those necessary to protect the property, shall not be required as a condition of employment to live in homes rented from the employer.

E: No employe shall be required as a condition of employment to trade at the store of the employer.

F: District agreements shall be made, not inconsistent herewith, dealing with local or district conditions to secure continuity of work, fix fair compensation for yardage and deadwork, promote care in the preparation of coals for the market, provide the machinery for settling disputes, and safeguard the respective interests of employers and employe.

G: No person under sixteen years of age shall be employed inside a mine.

H: The term "employe" as used in this code shall not include a member of the executive, supervising and confidential force of the operators.

[fol. 60] United Mine Workers Journal

September 1, 1933

Brief Submitted by President Lewis for Coal Code

Conditions of Employment

The first condition of employment set up is those provisions of Section 7A of the Recovery Act that the law requires to be incorporated in the code, but it is our view that the law is not complied with merely by the perfunctory insertion of these provisions in the code. Our code regards this law as setting up the standard of the relations that must prevail between the employer and the employe; and that it requires that employer to recognize the right of his employes to freely organize and bargain collectively through his own representatives for his wages and working conditions.

Other conditions of employment upon which we have agreed with the operators are embodied in the code, and, in the main, have been established through the precedents of many years, and represent the best practices of the industry.

Provision is made for the miners to elect a checkweighman to work along with a similar representative of the mining industry, for the purpose of auditing the output of tonnage workers as it comes from the mine. In mines where output is measured by other standards than weights, the miners are also given the right to check such methods through representatives of their own choosing. Such representatives of the miners are paid by the miners through the check-off, or by pro-rate deductions each pay-period from earnings.

The "check off" system which has prevailed in this country for many years, indeed so far as the records go, was originally inaugurated by the operators to cover house rents, miners' supplies, store accounts and similar items. The practice, in reality, insures greater cooperation and efficiency from employes, and has never been opposed in this country by any other operators than those who have sought to weaken labor union organization. In our agreement as to working conditions of the code, we have included, in addition to dues to labor organization, deductions for employe rentals, house coal, powder, mine supplies, store accounts, and other legitimate items.

Because of the myriad of differences in the physical occurrence of coal and conditions of mining, we have also agreed that district agreements may be made as to working conditions which are not inconsistent with general standards of working conditions embodied in the code. Also district arrangements for the settlement of industrial disputes and maintaining continuity of work are authorized.

It is further agreed upon in the code that employes shall not be required as a condition of employment to live in houses rented by employers or to trade at stores conducted by employers. A constant source of friction in mining communities is thus avoided.

Competitive Wage-Cutting Within the Industry—1925-1933

The provisions of our code jointly agreed upon as to rates of pay of employes are very moderate.

Before considering the code rates of pay for mine workers [fol. 61] it is necessary to realize that as the result of competitive wage slashing within the industry prior to 1930, and its intensification by the depression since 1929, the wage standards of all the bituminous coal workers reached unprecedentedly low points in March and April of this year. In the latter month, it will be seen by referring to the exhibits submitted, aggregate pay rolls as shown by the United States Bureau of Labor Statistics were 74.4 per cent below the 1929 disbursements, and the average weekly earnings of bituminous mine workers of all classes was only $10.82 as compared with $22.00 per week in the same month of the year 1929. Actual daily earnings had followed the same downward course, being only 53 per cent in 1933 of what they were in 1922. In many localities rates were even lower.

The most recent reports of the Bureau of Labor Statistics show that while the state of Illinois in 1933 was maintaining a minimum rate of 50 cents for inside mine workers, eastern Kentucky mines were at the same time paying a minimum rate of 15.6 cents per hour for the same class of workers; western Kentucky and western Pennsylvania, 18.8 cents; northern West Virginia, 25 cents; and southern West Virginia, 20 cents per hour.

As to outside workers, the rate in Illinois in 1933 was 30 cents per hour; 15 cents in eastern Kentucky; 19 cents in western Kentucky; 18 cents in western Pennsylvania; 14

cents in northern West Virginia, and 18 cents in southern West Virginia.

As the Bureau of Labor Statistics shows only an average of 26.1 hours worked per week during this period, the ghastly inadequacy of the earnings of mine workers at the present time becomes at once apparent.

The average rates for all classes of outside workers in 1933 including many classes of skilled and semi-skilled workers—as shown by this official report were equally inadequate, ranging from 49 cents per hour in Illinois to 28 cents per hour in western Kentucky and northern West Virginia mines. The average rates of pay per hour for underground workers as a whole in 1933 ranged from 59 cents per hour in Illinois to 31 cents per hour in eastern Kentucky and northern West Virginia.

In contrast with these deplorable wage rate conditions, a minimum wage rate in a code, however low and inadequate it may be, may represent a considerable advance over the indefensible minimum rates which have prevailed this year in certain districts of both the North and the South. In forming minimum rates for our code, we have, therefore, agreed upon rates which are approximately those now prevailing in the unionized fields. (I may say here by way of explanation that in referring to fields as unionized and non-unionized, I have reference to conditions which prevailed before the passage of the National Industrial Recovery Act. All fields have been unionized since that time. These union rates selected for the code are barely adequate and exceedingly low when measured by normal standards of compensation. If adopted, they will add very little to the purchasing power of areas previously unionized, but, on the other hand, they will bring non-union fields in the South and North up to more acceptable living standards.

[fol. 62] The Conservation of Minimum Rates Proposed

As I have already stated, the minimum rates upon which we have agreed are very conservative. As a matter of fact, under normal conditions, they would be entirely inadequate, especially when compared with budgetary studies of the minimum requirements of wage earners' families for the maintenance of decent living conditions. This may be quickly seen by reference to our Exhibit Number 8, which I have submitted.

During the past two decades the principle of the living wage has been quite generally accepted. Moreover, a series of studies by responsible authorities of the amount of income necessary for a living wage has placed the subject on a factual basis. We now know, with sufficient accuracy for practical purposes, the approximate income which a family must have in order to maintain what, for lack of a better term, may be referred to as a minimum standard of living for American wage-earners.

This subject was gone into quite thoroughly by the United Mine Workers of America in their appearance before the Anthracite Board of Reference in December, 1932. As then pointed out, it is not necessary to review at length the whole series of minimum budget studies which have been made, especially since 1920, in order to obtain a fair picture of the subject. For present purposes, therefore, it would seem difficult to call attention to the six outstanding studies, made since 1920, and made in all cases by agencies of accepted authority. These six are:

1. United States Bureau of Labor Statistics: Minimum budget for a coal mine worker's family in eight bituminous coal towns of Pennsylvania and Ohio. Study made in 1920, at the request of the United States Bituminous Coal Commission.

2. Bureau of Municipal Research of Philadelphia: Minimum budget for a workingman's family in that city.

3. Heller Committee of the University of California: Minimum budget for a workingman's family in that state.

4. Visiting Housekeepers' Association, Detroit: Budget for the use of social workers in determining relief for dependent families.

5. Council of Social Agencies, Chicago: Budget prepared for the use of social workers in determining relief for dependent families.

6. California Civil Service Commission: Budget study for purpose of establishing fair wage scale for laborers in employ of the state.

When these budgets are brought down to date by applying the Cost of Living Index of the Bureau of Labor Statistics, all practically agree as to minimum family costs.

In order to be entirely conservative, however, comparison between a "living wage budget" and the possible earnings under the wage rate structure of the bituminous coal code may be limited to the lowest cost budget of those listed—namely, the budget compiled by the United States Bureau of Labor Statistics, of which the annual cost for a family of five was found to be $1,353.00 in June, 1933. This is particularly appropriate as this budget is concerned solely with the families of bituminous coal miners.

These tables and the accompanying charts in our exhibits show clearly that the minimum wage rates proposed in our Bituminous Coal Code will fall short of the require-
[fol. 63] ments of a living wage, even if the workers have opportunity for employment for 250 days per year, and even for those receiving the highest minimum of $5.00 a day. Thus, the $5.00 per day man, with 250 days of work can only earn $1,250 a year, while the minimum budget for a living wage, at the present level of cost of living, requires $1,353, thus creating a deficit of $103. If the $5.00 per day man has opportunity for only 225 days work, his annual earnings would be only $1,125, or $228 short of the minimum budget. It should be mentioned also, that these figures are for gross earning possibilities. Deductions for supplies would reduce net annual earnings at least $100 more and add the same amount to deficits below budgetary standards.

As regards the outside laborers, at $4.00 per day, annual earnings would be only $1,000, even on a 250-day basis—as against the minimum budget cost of $1,353. The laborers in the southern districts with minimum rates of five per cent less than those in the other districts would be correspondingly worse off as regards a living wage.

These computations are extremely conservative, especially as the minimum budget is computed on prices as of June, 1933, when prices were just beginning to increase after a long downward swing. To the extent that prices and the cost of living continue to increase, the discrepancies between the minimum wage rates established in the code and the amounts necessary to meet a minimum living budget will comparatively increase.

Rapid Increase in Prices and Cost of Living Inevitable

There is, in all probability, not a single intelligent observer of current events who does not expect a sharp and

fairly long continued upward movement in prices. There are several clear-cut reasons for this attitude. First, prices have been abnormally low, in some cases below the cost of production. Second, the abandonment of the gold standard by most of the countries of the world, led to a sharp appreciatoin of prices in the international markets, and this was reflected, in part at least, in the domestic markets. Third, the frank acceptance of a price inflation policy by the administration, with the granting of full powers to the President will exercise these powers. Finally, the carrying out of the National Recovery Act, resting as it does upon the twin principles of shorter hours and higher wages, will inevitably lead to increased costs of production and thus to higher prices.

The only alternative would be to hold down costs of production by further mechanization and labor displacement, and this is contrary to the fundamental purpose of the Recovery Act, which is to assure increased employment. Ultimately, of course, we must seek to profit from all methods which increase the efficiency in industry and make work less laborious, but as an immediate policy, and as I believe the Recovery Administration fully realizes, a too great stimulation of efficiency and labor displacing methods would be disastrous.

For all of these reasons, an increase in the price level is to be anticipated. Already the movement has begun. The wholesale price index of the United States Bureau of Labor Statistics, from its low point of 59.8 in February last had risen to 68.9 in the week of July 15th, an increase of no less than 15.2 per cent in five months. There is probably no precedent for such a rapid rise in wholesale [fol. 64] price, a rise which affected all classes of commodities. There is no doubt that some of this increase was speculative and unwarranted, and there will undoubtedly be temporary recessions, but there is also no doubt that the general movement will be steadily upward.

Retail price always lag behind wholesale prices in a rising market, but retail prices have already begun to respond. Thus the index of food prices at retail, as compiled by the United States Bureau of Labor Statistics, after reaching a low point of 90.4 in April last, shot upward to 93.7 in May and to 96.7 in June, an increase in two months of almost 7 per cent.

Even in the case of the general cost of living—which includes many items which are less responsive to sudden price changes than such items as food—the upward movement is under way. The Bureau of Labor Statistics' index of cost of living is of no service here as it is compiled only every six months, but the monthly cost of living index of the National Industrial Board rose from 71.5 in April last to 72.1 in May and to 72.8 in June.

It is perfectly clear, therefore, that we may look forward to an increased price and cost of living, well above the present level. How far above, is a matter of speculation. If, however, the earning capacity of the workers is to be restored even to the pre-depression level, there is every reason to believe that the price and cost of living level will also be restored to substantially the same level. Especially is this to be expected as the administration's economic policy, while never stated except in agricultural recovery, apparently contemplates the restoration of the pre-depression level of wholesale prices throughout mining and manufacturing.

If these things should come to pass, as they almost certainly will, the workingman may anticipate, in the near future, an advance in his present cost of living from an index of about 128 (using the Bureau of Labor Statistics' figure) to one of above 170, or an increase of from 30 to 35 per cent in present levels.

Differentials

There is no justification for the maintenance of a system which permits the present differentials, either in or between districts.

The tendency of recent years has been to aggravate further this condition, and as a consequence, develop a situation that has destroyed every reasonable degree of fair competition. It has also contributed largely to the degradation of miners' wages.

There never has been a scientific study of this question. As matters now stand, the established differentials in many instances have been the source of continued discord among miners and operators alike.

An example of the inequitable and arbitrary application of differentials is to be found in the Pittsburgh District, where in the year 1902 a geographical line was drawn from a point on the Youghiogheny River, known as Suterville,

extending to Belle Vernon, Fayette City, Charleroi, Ellsworth and Marianna. All coal mined south and southeast of this line was given the benefit of a pick mining differential amounting to 10¢ per ton below the rates paid for pick mine coal north of this line. A corresponding differential to the advantage of the same group of operators, was granted for hand loading and machine cutting. No consid- [fol. 65] eration was given to the thickness of the vein, and there was no reason for any claim for lower tonnage rates.

On the contrary, many of the producers south of the line enjoyed, and do still enjoy, the benefit of river transportation, the freight charges of which are considerably less than are paid by operators in the so-called thin vein, who ship only by rail. Despite that fact, the operators producing coal in the so-called thick vein enjoy a differential in pick and machine mining below their competitors in the Pittsburgh District, yet it is notoriously true that much of the coal mined in the so-called thick vein territory is about the same in thickness as is the so-called thin vein district.

Operators suffering for years from the effects of these differentials have sought in vain to make the tonnage rates the same throughout this area, and mine workers have complained, even to the extent of striking, against a continuation of this abuse.

With relation to differentials obtaining in districts south of the Ohio River, the United Mine Workers of America for years have contended that the disparity in day and tonnage rates has wrought incalculable damage to the industry as a whole; this was particularly true of the period when the United States Mine Workers had wage agreements with operators producing 70 per cent of our national tonnage. Here is an instance where interests producing 30 per cent of the nation's tonnage, in an effort to secure more markets, scuttled and destroyed the industry by wage and price slashing.

The upward trend of production in West Virginia and Kentucky within recent years indicates the extent to which inexcusable differentials favoring those states have wrought havoc to the industry. The accompanying table prepared by the Bureau of Mines known as Exhibit 8a, gives a factual picture of the disastrous effects of unfair, arbitrary and inexcusable wage differentials upon the structure of the bituminous coal industry.

Lack of uniformity of wage and tonnage rates between competing districts has pauperized the miners and bankrupted the operators. The story of the ills of bituminous coal, the age of low wages and cutthroat competition, are all directly interwoven with discriminatory differentials in wages.

The report of the Bureau of Labor Statistics, showing the trend of hourly rates paid miners in various states for the years 1929 to 1933, shows a relative evening-up of day wage and tonnage rates during those years. Exhibit 7. Despite this fact, the districts comprising West Virginia and Kentucky have been able to sustain easily their position in the markets of the country.

This problem of differentials between the North and South is further complicated with sentimental considerations.

It is an easy thing to charge that the United Mine Workers of America is interested only in promoting the operations of the North; but it must be apparent that our organization must concern itself just as much with the welfare and with protecting the working time of our members in the South as those in the north. Throughout this entire southern region all of the eligible mine workers are enrolled in the United Mine Workers of America, and their opportunity for employment and earnings must be protected there as elsewhere.

The chief interest of the United Mine Workers of America [fol. 66] is to stabilize the bituminous coal industry by establishing rates of pay for day and tonnage workers that will enable the mine workers of the nation to secure reasonable wages and work opportunities, and at the same time permit the development of a condition within the industry that will tend to promote fair competition between the producers of the several states.

In consideration of all these factors, and in the hope that we may be able to establish fair relative rates of pay in and between competing districts, and in furtherance of our conception of the provisions of the National Recovery Act; that it is to promote a system of fair competition in the bituminous coal industry, we have agreed to an arrangement which will permit the establishment of a five per cent differential in favor of northern West Virginia and all of

the territory south of the Ohio and east of the Mississippi Rivers.

As to the question of differentials within districts, attendant upon tonnage rates, it is the expressed desire of the United Mine Workers of America that in the district conferences created for the purpose of establishing tonnage rates comprehending a condition of fair competition within districts and with competing districts, that the conferees should apply themselves most diligently to the task of eliminating these absurd internal differentials, and make secure to the tonnage worker a minimum wage at least equivalent to the minimum rates for underground day workers.

It may well be that it is beyond the possibilities of a general code to have set up the various tonnage rates of each district; but a general code such as we submit can fix the standards by which the districts shall in supplementary codes report to the administration these various tonnage rates. The districts have for years made such rates, and are prepared to make them now. The only question is what standard shall they follow. These standards are set up in our code: that the tonnage rate shall provide a competitive equality of production cost and secure to the tonnage worker a minimum wage equivalent to that received by inside day labor.

Whether or not such supplementary codes present rates conforming to the standards of this code can be easily determined by the experts and statisticians of the administration. There could be even an easier solution, providing the Recovery Administration, in the exercise of its powers, directed the representatives of labor and the operators of the various districts to prepare and submit for the consideration of the Recovery Administration while in the city of Washington, their joint schedules of minimum tonnage rates.

A formula that could be accepted as a standard for all seams of coal varying in thickness from five feet and over to be paid for—

Drilling by hand and loading in wide work, 58¢ per ton.

Undercutting in wide work, 12¢ per ton.

The definiteness of this rate for undercutting could perhaps be better established when consideration is given to the kind of machine that might be used for undercutting purposes. This would be in the interest of equity and that section of the Act relating to standard minimum wage rates.

In the establishment of tonnage rates for all seams less than five feet in thickness conferences could arrive at rates properly correlated to the minimum tonnage rates for all seams less than five feet set up here as a formula. However, it will be found that the tonnage rate established for drilling by hand and loading in all seams five feet and over will directly affect approximately 80% of our national tonnage. [fol. 67] The problem of the rate for pick mining can be resolved in the same manner, using 88¢ per ton as a basic rate to achieve for the pick miner the minimum wage of $5.00 per day.

It is understood that the application of these various tonnage rates relates solely to a ton of 2,000 pounds on a mine run basis.

The figures as to tonnage rates that I have used do not reflect the position of the United Mine Workers of America upon this question, but are merely a formula. The final determination of such rates can only be arrived at when maximum hours of labor have been set up in the code.

In the competitive territory comprising Colorado, Utah, Wyoming, and Montana and Washington, the maintenance of existing rates is jointly recognized in our code.

No Sectional Differences in Cost of Living

In the course of the various conferences incident to the framing of codes and in the subsequent hearings on these codes; much has been said regarding the differences in cost of living, especially as between the North and South. In the bituminous coal code, the labor provisions of which we helped to draft, and are willing to accept on all points except as regards the weekly working period, we have agreed to a 5 per cent differential for the southern fields. In doing so, however, we are merely making a concession to a traditional practice, and do not admit that such a differential is justified by differences in cost of living.

Regarding this matter I have gone into all the available evidence, and as a result I wish to make two emphatic statements: First, that there is not the slightest evidence that the cost of living is lower in the South; and second, that such evidence as exists indicates that very possibly the cost of living, for an equivalent standard of living, is higher on the average in southern than in northern communities.

Those who take the opposite position are confused by the fact that southern workers, on the average, at present live on less because they receive less than the northern workers. But this proves nothing as regards the relative cost of living. What we want to know is whether there is any difference as between the sections in the cost of maintaining the same, or, at least, an equivalent standard of living. The only way to determine this would be actually to "price" a given budget of household supplies in the two sections, making allowances (if there are any such) due to climate, etc., but taking care that the same general average of well-being is maintained. For instance, it would be proper to make allowance for all lower fuel consumption in a tropical community as compared with a far northern community, or to make allowance for the fact that laundry costs might be higher in the tropical community, but it would be obviously unfair to make any allowance for a lower milk consumption by children in the South, just because milk prices are higher.

No such studies, however, have been made for the United States, and in all absence thereof we must fall back on such data as we have regarding relative prices in the two sections. These data, while far from complete, are sufficient, I believe, to establish the fact that prices for the same types of articles are now lower in the South than in the North.

[fol. 68] Take, for instance, the matter of retail food prices, and these are of primary importance because food constitutes in normal times between 30 and 40 per cent of the lower paid workers' living budget, and in times of depression like the present, may run as high as 60 to 70 per cent of his total expenditures. The United States Bureau of Labor Statistics publishes monthly figures regarding the retail prices of all the important figures and items of food for a group of representative cities. I have had these prices, as thus published, by the bureau as of June 15, 1933, weighted according to the importance of each item in the working family's budget also as compiled and published by the Bureau of Labor Statistics. The results give the total cost of what may be called the Bureau of Labor Statistics' market basket of supplies in each of the fifty-one cities. The average cost for all the cities is found to be $25.147. The cost for the thirteen southern cities, ranging southward from Virginia to Texas is $250.65. In other words, these official figures indicate that the cost of food, of the

same quality and amount, is almost exactly the same on the average in the South as in the North. Considerable differences are shown in the tabulation as between individual cities, but these differences aren't sectional in character. Thus the highest cost city as regards food is San Francisco and the lowest, Detroit.

Turning next to rents, which ordinarily constitute about 15 per cent of the worker's family budget, no recent data are available. However, in the 1918-19 study of Cost of Living by the Bureau of Labor Statistics, figures are given to show the average rent per room for houses and apartments in ninety-two cities and towns widely distributed as regards location. Rent per room is a much better standard for measuring housing cost than the rent of a whole house, as variations in the sizes of houses are thus eliminated. Since 1918-19 rents have, of course, changed, but there is no reason to believe that the changes have been very different as regards different communities. Therefore, in the absence of later date, these figures may be taken as indicative of the rent situation as between sections of the country.

A tabulation has therefore been made of the average rent per room in the ninety-two cities referred to as published in Bulletin 357 of the Bureau of Labor Statistics. The tabulation has been limited to houses, as apartment living is infrequent in many communities. Also because of the large number of communities covered in the report, the tabulation has been made by three sections—northern, southern and western—the divisions being those commonly employed, with Chicago included in both the East and West. The results show that the average rent per room per annum was as follows: South, $33.60; North, $32.24; and West, $39.30. Thus the rents per room in southern workers' families were lower, on the average than in the West, although considerably higher than in the North.

The Bureau of Labor Statistics compiles semi-annual figures regarding the prevailing prices of coal, gas and electricity in the same fifty-one cities for which it gathers food prices. For electricity, no comparisons can well be made because the selling unit is not uniform in different cities. In the case of coal, the existence of two types—anthracite and bituminous—for which we have prices, but not relative consumption, also makes comparison by cities difficult. In the case of gas, however, comparison may be made on the

basis of 3,000 cubic feet consumption. When, on this basis, tabulation is made of the prices of June 15, 1933, it appears [fol. 69] that the average price for the thirteen southern cities was $1.10 as against $1.04 in the North and $1.05 in the West. The South, in other words, is paying more for gas than the other sections of the country, and, as gas is used primarily for cooking, there is no reason to believe the consumption per family differs as between sections.

Summing up, it appears that food prices in the South are about the same as in the rest of the country; that rents are higher than in the North but lower than in the West; and that at least one important item of fuel—gas—is considerably higher in the South than elsewhere. Assuming gas to be representative of the fuel and litigating group of family budget expenditures, the above items constitute such a predominant portion of the workers' expenditures (certainly 60 per cent and in these times of depression possibly 80 per cent) that the other items, for which we have no information regarding relative prices or costs, are of relatively minor importance. We do know, however, that most clothing items tend to be higher in other sections of the country than in the north because of the added shipping charges. As regards possible differences in the cost of the clothing budget because of differences in climate, it is evident that no such differences apply in the case of the bituminous coal mines. West Virginia and Kentucky, for instance, have just as rigorous a climate as Illinois and Pennsylvania. Also as regards the items which are usually classed as "miscellaneous" in budget studies, such as carfares, moving picture tickets, medicines, newspapers, etc., there is absolutely nothing in reasons for believing that they are lower in the South than in the North or West.

[fol. 70] United Mine Workers Journal, September 15, 1933

President Lewis's Brief for General Coal Code

Cost of Living of the Colored Workers

A final point on the subject of cost of living. Most of the argument in favor of making a differential in wages against the south rests on the prejudice against a negro worker, and on the utterly mistaken notion that the colored worker has a lower cost of living than the white worker. This is the same confusion of thought as that mentioned

above. The negro worker, on the average, lives on a lower level of living than the white worker simply because his income is less. His desires, his needs, and his costs are identical with those of the white workers. Indeed, there is reason to believe that in the matter of housing, because of the formal or informal segregation of the colored population in most communities, the rents exacted from colored tenants are higher than those charged the whites. This was indicated in the 1918-19 cost-of-living survey by the bureau of labor statistics. A table published in the September, 1920, issue of that bureau, shows separately the rents paid by white and colored tenants for twelve cities. It there appears that the average rent per room paid by white families for houses was $38.26 and for flats and apartments, $45.20, as against $33.50 and $38.55 respectively for colored tenants, the rents for colored thus being somewhat lower than those for whites. Further analysis of the data show, however, that the housing of the colored was far inferior to that of the whites. Thus, of the houses and flats occupied by whites, 55.9 per cent had bathrooms and 64.7 per cent had inside toilets, whereas in the case of the colored houses and flats, only 21.3 per cent had baths and only 25.1 per cent had inside toilets.

Lack of Agreement as to Hours of Work

The representatives of the operators and the United Mine Workers in formulating a code were unable to reach an agreement as to the length of the workday or work week. The operators insisted upon a workday of eight hours and a four-day or thirty-two-hour workweek for one-half of a twelve-month period, and a five-day or forty-hour workweek for the remaining half of the year, with the further provision that any operator might elect to operate any mine on a schedule of employment of not to exceed thirty-six hours per week throughout the twelve-months' period. The mine workers were equally insistent that the six-hour day five days per week should be established for the industry. The outcome was that the schedule of work hours proposed by the representatives of the operators was placed in the code with an explanatory note stating that the mine workers reserved the right to continue their fight to secure a six-hour day, five-day week when the code came up for consideration by the national recovery administration.

An analysis of the existing and authoritative data bearing upon the matter of hours, led the mine workers to the firm conclusion that the existing workday of eight hours and the existing work-week should be reduced for three main reasons:

1. Eight hours' work underground "at the face" is excessive.

2. A reduction in the length of the workday would decrease accidents and add to the health and efficiency of mine [fol. 71] workers.

3. A maximum work-week not to exceed thirty hours is absolutely necessary in order to stabilize operations of the industry upon the basis of a reasonable field of employment and earnings.

We have prepared exhibits relating to each of these points, which I shall now submit, as follows, a basis for a brief discussion of the matters:

Exhibit No. 9—Hours of labor of bituminous coal mines.

10—Hazards in the bituminous coal mining industry.

11—The thirty-hour week and employment stabilization.

12—Statement of Philip Murray, vice president, United Mine Workers of America, before the senate judiciary sub-committee considering the Black Bill for establishing the six-hour work day.

Existing Hours of work Are Excessive.

Perhaps the most striking fact in connection with the question of hours or work is that while the great majority of mines have established the eight-hour policy, the percentage of employes in eight-hour mines has steadily decreased. Thus, while in 1920, 97.1 per cent of the employees were in eight-hour mines, the percentage declined almost without interruption, and in 1931 was only 92.0; whereas the percentage employed in nine-hour mines rose from 2.0 in 1920 to 6.7 in 1929 and was almost as high (6.1) in 1931.

The workday of eight hours, which generally prevails, however, in the industry, it should be borne in mind, refers

to the time to be spent at the face of the coal vein, and does not include the entire period underground. The United States bureau of labor statistics has, at two-year intervals, made studies of the actual hours of work at certain pay roll periods. Such studies are available for the years 1922, 1924, 1926, 1929 and 1931. In the case of the miners and loaders, who are underground employes and constitute about two-thirds of the total wage-earning personnel, distinction is made between "the time spent at the face" and "the time spent in the mine." The distinction rests upon the peculiarity of the coal-mining industry that in most mines it is a very considerable distance from the mouth of the mine to the actual working places.

Four points should be especially noted from the results of these inquiries as set forth in our exhibits:

First: That in the case of miners and loaders both the time spent at the face and the time spent in the mine, had sharply increased over the ten-year period, 1922-1931. Thus, in 1922, the average time at the face was 7.7 hours, while by 1931 this average had risen to 8.1 hours; and similarly, the average hours in the mines rose from 8.3 in 1922 to 8.8 in 1931.

Second: That there is a very considerable difference between the time spent at the face and the time in the mine, this difference being as much as eight-tenths of an hour (or forty-eight minutes) in 1929. In other words, the under-[fol. 72]; ground workers in addition to the time at their work places spent the major part of another hour in the trip from and to the mine mouth.

Third: That the time spend underground varies according to occupation. In no case in 1931, according to the bureau of labor statistics' reports, was it less than 8.7 hours per day for any of the occupations, but in some cases it was considerably higher, being 9 hours and 30 minutes for machine loaders and cutters, 9 hours and 40 minutes for contract loaders, and 10 hours and 10 minutes per day for machine cutters' helpers.

Fourth: This variation becomes even more striking when it is analyzed according to states. In 1931, in Alabama, Tennessee and Virginia, machine cutters were in the mine in excess of 10 hours per day and their helpers more than 11 hours per day; machine loaders in West Virginia worked

11 hours and 18 minutes; in Ohio, 10 hours and 10 minutes; in Kentucky, 9 hours and 40 minutes; and in Illinois, 9 hours.

In general, it may be said that during the past ten years the hours of work "at the face" and in the mine have increased.

Shorter Hours Mean Employment Stabilization

Moreover, hours of work within the industry must be reduced to thirty per week in order that surplus labor may be absorbed and employment stabilized on a basis which will mean decent earnings for all available men in the mining districts.

As the result of a careful study of all mining districts, made by the representatives of the United Mine Workers in July, 1933, it is evident that there were 554,700 men available and desirous of securing employment in the mines. Our exhibits show that for the five years preceding the depression, or the period, 1925-1929, the average annual output of the bituminous mines was in round figures 529,000,000 net tons. The number of men employed in 1929 was 502,993. It may be said, therefore, that the normal annual demand for coal in 1929 was approximately 500,000,000 tons which required 500,000 men to produce. The output per men per pay in 1931 was 5.30 tons.

As the industry of the United Mine Workers discovered 554,700 men available for work in the mining fields in July, 1933, it is evident that there was an excess or surplus manpower available in the coal communities at that time, on the basis of the normal production requirements of the industry, of 54,700 men. As compared with the subnormal conditions now prevailing the surplus of men is more than 200,000. In the light of these conditions it is apparent that the standard workday must be reduced at least two hours so that those now idle may be re-employed, including the 54,700 in excess of the normal working force of 500,000 workers who are also awaiting the opportunity of work.

On the basis of the foregoing analysis, if the 32-hour and 6-hour week and 8-hour day as advocated in our code by the operators should be adopted, it would yield at the minimum on the basis of the 1931 tonnage per man and of a normal output of 500,000,000 net tons only 200 working days or 40 weeks' work per annum for the 554,000 men

shown in the investigation of the union to be now available for work.

[fol. 73] On the other hand, if the contention of the operators who were members of our code conference be accepted, to the effect that the adoption of a six-hour day would be attended by no gains in efficiency, but by a loss in output corresponding to the reduction in the length of the workday for eight to six hours, production on a six-hour day would proceed upon the basis of four tons per man per day.

There are now available for service in the industry, according to the returns collected by the union, 554,000 men. On the basis of 4 tons per man per day the daily production would be 2,216,000 tons. This daily output keyed to an annual production would yield 554,000,000 tons for 250 days per year working time.

Of course, it is not expected, nor is it possible, that all of the available men could work each of the 250 days. Varying conditions incident to coal mining prevent this, such as accidents, sickness, and gas, water, falls of roof and other physicial causes. The normal idleness due to these causes can be conservatively estimated at 10 per cent—of 55,400 of the 554,000 available men—thus giving steady employment to about 500,000 men daily, who would produce 2,000,000 tons each day and 500,000,000 tons for 250 days' work each year.

On the other hand, there are many other factors entering into the situation which offset or counterbalance each other. The output per man per day steadily increased throughout the period, 1925-1931, and amounted to a total advance in man-day productivity of 7 per cent during these years. It is not reasonable to assume, therefore, as is done by the operators, that a change from an eight to a six-hour workday would not be accompanied by some gain in hourly productivity. An estimated gain of 5 per cent would at least be ultra conservative. It would probably be at least 10 per cent. The mine worker, because of shorter hours, could and would obviously work with greater intensity. The history of all changes to shorter work days has been that productivity per man-hour increased.

It is also clear that the record of 10 per cent of the operating forces being idle each day in the past from certain involuntary causes, might be considerably modified by a shorter work-week. Mine workers would be more fresh and alert and more able to escape injury if accidents should

occur, and in a better physical and nervous condition to prevent the occurrence of accidents. A shorter work-week would also stimulate management to a higher degree of supervision and lead to the elimination of conditions which have caused loss of working time under the longer work days of former years.

Moreover, the total number of men now shown—at a point near the lowest depths of the depression—to be available for work, may very likely be supplemented by a return of former mine workers to the mining districts when industrial conditions become more active.

All of these possibilities tend to counterbalance or supplement each other. If we assume, for instance, that a change from an eight-hour workday would result only in a 20 per cent loss in productivity per man per day, which would be quite conservative, and only *in* 7½ per cent of the operating forces would be away from work each day by reason of a change to six hours on account of sickness, accidents, or other voluntary causes, and, if we should assume further that under a shorter workday notwithstanding any in- [fol. 74] creased productivity per man per hour would absorb men returning to the mining districts as industrial activity and the demand for coal developed, all men available for work in the mining districts would be steadily employed from 225 to 250 days each year.

Furthermore, we may assume that as time goes on the adoption by other states of the law of Pennsylvania prohibiting underground workers under eighteen years of age will reduce accidents and also place a restriction upon the number of men in the mining districts available for employment.

It is also admitted by opponents of the six-hour day that increased use of oil, natural gas and hydro-electric power has made definite inroads into the coal markets of the nation, and that the improved efficiency in the combustion methods on railroads, in steel mills, public utilities, and manufacturing establishments has reduced materially the coal requirements of the nation, and that due to these causes we can hardly expect to get back on an annual 5,000,000,000 tons basis of production for bituminous coal mines.

If this be true, then the opponents' argument lends strength and support to the five-day week and the six-hour work-day.

In conclusion it may be said that the five-day week, six-hour day will extend employment to all available men in the industry. It will check overproduction and place the industry in a position to produce at least our national coal requirements. It will eliminate, so far as practicable, the evils of cutthroat competition. It will stabilize costs and maintain wages at reasonable levels. It will enable the producers to secure fair returns on their investments. No other remedy can yield such beneficial results.

The eight-hour day will continue the present chaos. It will not create more employment. Overproduction is bound to trail in its wake and the consequent evils of cutthroat competition, low wages and bankruptcy are bound to accompany it. Rationalization of the industry can only come through the six-hour work-day and the five-day work-week.

Accident Rates and General Hazards of the Bituminous Coal Mining Industry

The accident hazard of bituminous coal mining may best be shown by comparing the accident rates in this industry with the accident rates in other industries. This may be done from the compilations in our exhibits taken from the reports of the national safety council. These studies show that, with the single exception of anthracite mining, bituminous coal mining is the most hazardous of all the industries covered by the national safety council's studies. Thus bituminous coal has an accident frequency rate of 56.20 as against 48.15 in the construction industry and 10.87 in steel. As regards accident severity, bituminous coal has a rate of 9.68 which is almost double that of the construction industry and more than four times that of the steel industry.

The accident hazard of coal mining in comparison with other occupations is also shown in a recent compilation of the Metropolitan Insurance Company, although the anthracite and bituminous coal branches of the industry *and* could not be presented separately. This study showed that the frequency of accidental deaths among miners was 128 [fol. 75] per cent more than the average for all industries, and that there were only two other occupations—electric linemen and railway enginemen and trainmen—out of a total of 73 listed, which had higher accidental death rates than coal mining.

Bulletin 507, of the United States bureau of labor statistics, based primarily on the experience of the Metropolitan Life Insurance Company with its own policyholders, states that:

> Coal mine accidents alone, judging from the comprehensive reports of the United States bureau of mines, are responsible for about 5 deaths annually per 1,000 underground workers who work 300 days a year. Such a fatal accident rate is clearly indicative of a very high total death rate. In the experience of the Metropolitan Life Insurance Company, 22 per cent of all deaths among coal miners is due to accidental violence. The outstanding features of the mortality of coal miners as revealed in this study are the very high ratios for respiratory diseases and accidents, the low ratios for tuberculosis, and the large proportion of deaths clearly occupational in origin. More than one-fifth (21.5 per cent) of the deaths are assigned specifically to occupational causes. Occupational accidents account for 15.8 per cent of all deaths, while occupational diseases are responsible for an additional 5.7 per cent (p. 32).

In 1930 there were 739 accidents reported for boys under 18 years of age in the coal mining industry. According to the department of mines' estimate of the number of boys employed in the coal mining industry in 1930, one out of every seven of the boys employed met with an accident during the year. More boys were injured in the bituminous industry than in the anthracite, but in both branches of the industry the accidents occurring at inside work exceeded those at outside work. Only a little more than one-half the boys employed in the coal mining industry worked underground, yet nearly three-quarters of the accidents occurred inside the mine.

In general it may be said that coal mining is more hazardous than any other form of mining, and according to the reports of the national safety council, more hazardous than any other major industry in the United States.

The most severe accidents in the bituminous mines occur, as a rule, early in the day's work. Only a small amount of data exists in available form as to the hours of the days in which the general run of accidents occur. In 1925, a special study was made by W. W. Adams, statistician of the bureau

of mines, which showed that out of a total of 132 accidents during the day shift, 45 occurred between 8 and 10 o'clock in the morning, and 55 between 1 and 3 o'clock in the afternoon.

During the latter part of the workday—the last two hours—the miner is physically, nervously, and mentally fatigued. He is more inclined to take chances, and less able to protect himself by thinking or acting quickly in order to avoid any dangers which may occur. Moreover, he may, because of his fatigue, leave his working places with conditions such that they may grow worse during the night and contribute to accidents in the next morning.

Although concrete data are not available in sufficient volume to demonstrate clearly the relation of the length of [fol. 76] the work-day to accidents, actual mining experience, as well as such statistics as we have, clearly show that a shorter workday would reduce accidents commensurately. This has been the demonstrated experience of manufacturing industries, and statistics are available to prove it. It is even more so according to experience in the mining industry, and is one of the principal reasons why the hours of work per day should be reduced. Longer hours reduce overhead costs. Shorter hours will save human beings from serious accidents and death.

In addition to adding ultimately to the efficiency of the miner, the six-hour workday, by reducing mining accidents, would more than offset added overhead costs, by the savings of losses which otherwise accrue to the operator, through longer workday resulting in more accidents.

Although the representatives of the mine workers have approved the provision of our code that minors under 16 years of age should not be employed in bituminous mines, we should be very glad to change this prohibition to 18 years or under. Such a limitation is now embodied in the mining laws or regulations of Pennsylvania, Wyoming and Arizona. The raising of the age limit for miners entering the industry would not only reduce the heavy accident rate which prevailed among this age group, it would also restrict the flow of beginners to the industry and thus would aid substantially in the stabilization of employment conditions at the present time.

If there is any industry that justifies the demand for the thirty-hour week—a demand that lies at the very basis of this Recovery Act—it is the bituminous coal-mining in-

dustry; and in reorganization of working time, the United Mine Workers of America has demanded the establishment of the six-hour day and five-day week since 1919.

The Principles of the Recovery Act Must Be Observed

As the representative of almost three-quarters of a million organized mine workers, I may say in conclusion that I come before this agency in a spirit of hope that is curiously mixed with a degree of anxiety. I firmly believe that upon the results of these and similar hearings there depends the future welfare of our country, if not of the whole western world. The critical character of the present economic situation is too well known to require repetition. We all know that barely four months ago we were at the edge of the abyss. We also know that we are still very close to the edge.

The present economic conditions, indeed, is not unlike the political situation which confronted our forefathers immediately following the constitutional convention of 1787. Then, as now, it was not the adoption of a legal document which determined the future. The constitution was, in essence, merely a body of principles, the architect's design for a mighty political edifice. Whether or not the edifice should actually be built depended upon the wisdom and courage and patriotism of the builders. Fortunately the builders possessed these qualities.

So with the present Recovery Act. This act offers, I believe not only a way out, but the only way out. But the Recovery Act, even more than the constitution, is merely a body of principles—the architect's design for a new indus- [fol. 77] trial edifice. Have we the necessary wisdom and courage and patriotism to build according to those plans?

I believe we have, but I am not quite as sure as I was a few weeks ago when the Recovery Act was initiated. To one who has followed closely the codes and hearings developing under the act, powerful industrial and financial interests are adopting a narrow and indefensible attitude, which, if not corrected, may well bring disaster. More and more the framing of codes is a matter of bickering and barter, of surrendering just as little as possible and grasping as much as possible. They appear to have become unconscious of the precarious condition of our entire economic syste-, and to be suffering from the delusion that we are

on our way back to the conditions which prevailed in the summer of 1929.

The Recovery Act means a rebirth—not the bringing to life again of the forces of former years which we have found *of* impossible. If we are to live, we must be born again with a new spirit and a new outlook. Co-operation is to supplant the old laissez-faire; an enlightened social and humanitarian consciousness is to take the place of ruthless competition. The collapse of our business and financial structure has taught us that this is the only way towards economic recovery and a better life. It has not resulted from the teachings of doctrinaires or from the agitation of visionary reformers. Those who have eyes but see not, the reactionaries of former years, should not be permitted to destroy the vision and the inspiration which the President has given us through the Recovery Act.

This unprecedented legislation makes it essential that co-operation take place. It does not destroy private initiative and enterprise but provides that it shall proceed with the public interest constantly in view.

The employer is the greatest beneficiary of the Recovery Act. He gets complete freedom from the anti-trust laws. He gets assurance against unfair competition, and against the overdevelopment of his industry. Thus, if he manages his business at all efficiently he secures what amounts to a government guarantee of reasonable profits and freedom from most of the worries which now trouble him—in short, that security of income and employment which the worker has so long been striving for but is still denied.

What does the employer give in return? Absolutely nothing. He is merely debarred from monopolistic practices and from the opportunity to exploit laborers and consumers, or, in other words, he is merely prevented from unduly absorbing the gains which arise from the productive efficiency of industry. If wage rates are increased, and if, by chance, costs *a* production are thereby enhanced, a commensurate increase in price is contemplated by the recovery program.

On the other hand, what do the workers, either by hand or brain, expect from the Recovery Act? Nothing beyond the right to organize and co-operate with the employers; and to receive what they have always been denied—a fair participation in the output of industry. Enlightened in-

dustrial leaders know now that this is not only desirable but necessary for they have learned since 1929 that such a participation in industrial output in the form of increased purchasing power of the workers is essential to the continued functioning of modern industry itself.

[fol. 78] From the public standpoint, the primary business of the coal industry is to produce coal at the lowest prices consistent with fair returns to capital, equitable wage rates, reasonable working conditions, and fair trade practices. This is not possible without the general organization of mine workers and proper recognition of their organization as the basis of co-operation.

Co-operation—genuine, whole-hearted co-operation—in all good faith between capital and labor in their own and the public interest is a fundamental assumption of and essential to the success of the Recovery Act. This is as it should be, but it is a fact *that* with which we must reckon. Until there is this co-operation, founded on mutual confidence and respect and the assurance that neither side is seeking to take advantage of or invade the rights of the other, it is not to be expected that industry will show that progress towards increased efficiency and output which constitute the crying need of the world today.

In behalf of the United Mine Workers of America, I may say that their members and their leaders would ask nothing better than to be able to lay aside all concern as to the establishment, extension and maintenance of the organization and to devote their best intelligence and all their efforts toward the betterment of the coal industry. Give them freedom from the cares that now infest them and the country will be amazed with the progress that will be made in labor efficiency, lowered production costs and regularity and continuity of operation. This is not an empty promise nor an idle boast. It is a thing that can be accomplished and three-fourths of the operators in the industry know this and are anxious to bring it about.

The United Mine Workers of America sincerely hope that under the influence of the Recovery Act and of public opinion the industry may be able to attain, through a co-operative spirit, to the maximum accomplishments of the benefits offered by the favorable provisions of the National Industrial Recovery Act.

[fol. 79] PLAINTIFF'S EXHIBIT No. 19

Copy

1617 Pennsylvania Boulevard,
Philadelphia, Pennsylvania,
July 9, 1940.

Col. Philip B. Fleming, Administrator, Wage & Hour Division, Department of Labor, Washington, D. C.

DEAR MR. ADMINISTRATOR:

As a result of certain investigations which have been conducted by the Wage & Hour Division at bituminous coal mines in Pennsylvania, particularly at the Revloc shaft of the Monroe Coal Mining Company, and a conference that has been held by your Supervising Inspector, Mr. Caffey, at Pittsburgh, Pa., with a committee of the Western Pennsylvania Coal Operators' Association, concerning the application of the Fair Labor Standards Act to the bituminous coal mining industry, certain questions have arisen that are disturbing to both employers and employees within the industry. These uncertainties have been continuing for some time and are causing much concern to the mine workers and the mine operators, especially with reference to "travel time."

Today, the Negotiating Committee of the Appalachian Wage Conference, namely: Messrs. J. D. A. Morrow, President of Pittsburgh Coal Company; L. T. Putman of the Raleigh Wyoming Mining Company, Beckley, W. Va.; L. C. Gunter, of the Southern Appalachian Coal Operators' Association, Knoxville, Tenn.; Charles O'Neill, President of the United Eastern Coal Sales Corporation, New York City; C. E. Cowan, Vice President of Monroe Coal Mining Company; Frederick H. Knight, Counsel for Monroe Coal Mining Company; W. L. Robisen, President of the Youghiogheny & Ohio Coal Company and Chairman of the Appalachian Wage Conference on the one hand, and Mr. Earl E. Houck, Director of the Legal Department of the United Mine Workers of America, met with Mr. Dorsey, Regional Director, Philadelphia, Pa., and Mr. Gallagher, Regional Counsel, Philadelphia, Pa., at which time these questions were discussed at length, particularly the application of the Act as to the question of hours of work in the bituminous coal industry.

The mine workers and the mine operators present presented their views to representatives of the Wage & Hour Division as to the provisions of the Appalachian Wage Agreement covering maximum hours and working time. We have filed with the Division copy of the Appalachian Wage Agreement, and the entire provision as to maximum hours and working time is included therein. The pertinent language, however, is "Seven hours of labor shall constitute a day's work. The seven-hour day means seven hours' work in the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis * * *." The Appalachian Wage Agreement is the basic agreement for [fol. 80] the bituminous mines in the States of Pennsylvania, Ohio, West Virginia, Virginia, Eastern Kentucky, Southeastern Tennessee and Maryland. In this territory there are several thousand rail shipping mines employing from 300,000 to 325,000 men, and some twenty-three operating districts. Each of the districts work out a local wage agreement covering its own territory, subject, however, to the provision that it must include within it all of the provisions of the Appalachian Agreement. The mines in the Appalachian region produce 70% of the total bituminous coal produced in the United States annually. Also, the Appalachian Agreement is used by the United Mine Workers of America as the basic agreement upon which the district agreements of the remaining 30% of the country is predicated.

The United Mine Workers of America and coal operators of the United States have been negotiating wage agreements for a period of fifty years. The Appalachian Agreement, covering as it does a great number of men and mines, has been worked out over that period of time and covers within its general provisions myriad wage rates, conditions of work, and hours of employment. This agreement, with its twenty-three supplemental agreements, constitutes a whole document. In those conferences, of course, hours of work has been one of the principal matters of consideration during this period of time. Hours of work with wage rates constitute the heart of any such agreement. In this basic industry we have provided for seven-hour days, five-day weeks, thirty-five hours per week, with high rates of pay. The basic inside day rate in the North is $.857 per

hour, and in the South it is $.80 per hour. The underground workers are paid on this basis with maximum rates for mobile loading machine operators, approximately $1.09 per hour. In addition, the agreement provides, "work by mine workers paid by hour or day in excess of seven hours in one day, or thirty-five hours in any one week, shall be paid for *it* at the rate of time and one-half * * *." It is our opinion that these substantive provisions of the agreement are among the highest standards of labor provided in any industry in the United States, both as to hours of working time and as to wages paid. There is full and complete understanding in the industry between employer and employees as to the application of these provisions. This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years and is the result of collective bargaining in its complete sense.

There are many reasons why the provision as to working time has been set out as provided by this agreement. The impracticability of measuring time by any other method is inherent in the very nature of mining coal. Coal mines are sometimes very extensive. When they are first opened up, the working places are, of course, close by and near to the opening of the mine. In such cases there is no problem of either transportation of the men to the working places or time consumed in reaching them; but as mines grew older, the working places move farther and farther away from the portal or opening of the mine, and as such conditions develop, it becomes necessary for provision to be made for transportation of the men over long distances to their working places. This is usually provided by what is known in the industry as "man trips." These trips are scheduled to leave the outside or opening of the mine at a certain hour, so that all the employees will reach their working places by the hour at which work regularly begins at the working paces throughout the mine, and these trips are also sched- [fol. 81] uled to leave the inside of the mine when the day's work is done, at the conclusion of the seven-hour period of work at the working places. Among other provisions of the agreement, there is provided a time for starting the day's work and a lunch period, as well as a time for expiration of the work day. There is some variation in this, depending upon local conditions as to the starting and quitting

time at the various collieries. The agreement provides for a certain tolerance. In any event, the starting and quitting time are no more than seven hours apart, exclusive of the lunch period.

In the many conferences that have been held over this period of fifty years, naturally all manner of suggestions and proposals for amplification or amendment of the agreement has been made both by the mine workers and the operators.

The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual working place. Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898.

It is urged that any ruling requiring such a change in the custom, tradition and contract provision so as to change the work day from "seven hours' work in the mines at the usual working places" to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated. In such an event, it would make necessary the reassembling of the Appalachian Joint Wage Conference and it would be faced with an issue that would be almost impossible of solution by agreement, resulting in an industrial conflict that could paralyze the nation. This would be a most unhappy result to flow from an act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and the high rates

of pay in the bituminous coal mines. The great amount of money involved in the case of extra payment by the operators or the great changes that would be required in the rates of pay to the miners, should any change in the present contract be necessary by reason of a new standard for the measurement of time worked, is so serious that a negotiated adjustment would seem to be impossible.

For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, and the definition of working time, as set forth in the Appalachian Agreement (which embodies the custom and traditions of the bituminous mining industry), as complying both with the provisions of the Fair Labor Standards Act [fol. 82] and of Interpretive Bulletin No. 13, to the effect that "reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act."

We therefore respectfully request that your Division issue a supplement to Interpretive Bulletin No. 13, stating that the standard of wages and hours of work, and definition of working time, set forth in the Appalachian Agreement, entered into on May 12, 1940, between twenty-three district associations of bituminous coal operators comprising the Appalachian coal producing area and the International Union, United Mine Workers of America, and the several district agreements based thereon, conform to and satisfy the requirements of the Wage & Hour Act.

Respectfully submitted, for the United Mine Workers of America: (S.) Earl E. Houck, Director of the Legal Department.

For Operators: (S.) W. L. Robison, Chairman; (S.) Charles O'Neill, L. T. Putnam, L. C. Gunter, J. D. A. Morrow, Appalachian Joint Conference, Negotiating Committee.

[fol. 83] PLAINTIFF'S EXHIBIT No. 20

Copy

July 18, 1940.

Earl E. Houck, Esquire,
Director of the Legal Department,
United Mine Workers of America,
1617 Pennsylvania Boulevard,
Philadelphia, Pennsylvania.

DEAR MR. HOUCK:

Reference is made to your letter of July 9, 1940, in which you inquire whether this division will give recognition to well-defined customs and prevailing practices in the bituminous coal mining industry with respect to the determination of hours worked for purposes of the Fair Labor Standards Act of 1938, particularly if such customs and practices have been crystallized for many years in bona fide collective bargaining agreements.

As you know, the determination of whether time spent in performing particular activities should be considered as hours worked depends upon the facts of the particular case. Accordingly, each activity must be scrutinized in relation to all the facts of the case. The provisions of bona fide collective bargaining agreements and the existence of prevailing customs and practices that time spent in performing a particular activity should or should not be considered as hours worked would not, in our opinion, necessarily be controlling. Thus, for example, the fact that it is the prevailing practice to pay for holidays and this practice is set forth in a collective bargaining agreement does not mean that the time which the employee would have worked if it were not a holiday must be considered as hours worked for the purposes of the Fair Labor Standards Act. Conversely, this division has indicated that short rest periods which interrupt the regular period of production may not be considered as a break in employment which may be deducted from hours worked. This would be true notwithstanding collective bargaining agreements or prevailing customs or practices in the industry.

The division does recognize, however, that some industries present peculiar hours worked problems and that such problems have been settled over a period of years to the

satisfaction of both employers and employees through bona fide collective bargaining agreements. Such cases involve difficult hours worked questions which are not susceptible of categorical answer. Strong arguments are available to support more than one solution and, in practice, the problems have been adjusted by means of a long process of give and take. Although the particular adjustment may be subject to some doubt, in our opinion, however, the courts in deciding these problems will take into consideration and be largely influenced by the custom and practice which has been set forth in collective bargaining agreements. Therefore, this division in carrying out its enforcement duties in the bituminous coal mining industry under the act will accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the particular industry and are supported by a long history of bona fide collective bargaining [fol. 84] agreements. In view of the circumstances which you describe in your letter and in view of the special facts which were developed at conferences with representatives of the industry, it is our opinion that the practice of computing working time on a "face to face" basis in the bituminous coal mining industry would not be unreasonable.

Of course, the foregoing decision should not be considered to apply to any mining operations where the traditional practice of computing hours worked differs from the custom in bituminous coal mining.

Very truly yours, (S.) Philip B. Fleming, Administrator.

[fol. 84-a] PLAINTIFF'S EXHIBIT No. 21

R-928

For Release Morning Papers, Saturday, July 27, 1940

United States Department of Labor

Wage and Hour Division

Washington

Two Mining Determinations Announced

Two administrative determinations, one dealing with the status of lessees in metal mines, the other with working time in bituminous coal mines, were announced today by

Colonel Philip B. Fleming, Administrator, Wage and Hour Division, U. S. Department of Labor.

The first determination was made at the request of metal mine operators and lessees of such operators in the inter-mountain states on the question of whether or not lessees of mining property are considered by the Wage and Hour Division as employees under the Fair Labor Standards Act. Colonel Fleming stated that each case must be determined on its particular facts, with primary importance given to the terms of each individual lease agreement and the method of operation under such agreement. If under the lease agreement control and supervision over the operations of the so-called lessee are reserved to the lessor, such lease agreement embodies the normal incidents of the employer-employee relationship and the so-called lessees will be considered as employees under the Fair Labor Standards Act. On the other hand, if a particular lessee is operating mining property which is not a part of the property currently being operated by the mining company with regular employees, and if in the lease agreement the mining company does not have the right to control the lessee in his operation of the mining property, it may well be that the lessee is not an employee of the mine owner but is in fact an independent operator of such property. However, Colonel Fleming pointed out, if such lessee has his own employees who assist in the operation of the leased mine, such employees must be paid in accordance with the Fair Labor Standards Act if the products of the mine move in interstate commerce. Colonel Fleming added that in the ordinary case the mine owner retains title to the ore mined by the lessee and his employees and ships the product of the leased mine, along with his own, in interstate commerce. Therefore, if the lessee does not pay his own employees in accordance with the requirements of the Fair Labor Standards Act, section 15 (a)(1) (the so-called "hot goods" section of the Act) prohibits the mine owner from shipping the product of the leased mine in interstate commerce.

Colonel Fleming also pointed out that two courts recently held lessees of mining property to be employees of the mine owner. One of the cases was decided by the Supreme Court of Utah under the Utah Unemployment Compensation Act, designated as *National Tunnel and Mines Company* v. *Industrial Commission of Utah*, 102

P. 2d 508. The other decision was under the Fair Labor Standards Act and was rendered by a Federal Judge in Oregon as a result of proceedings instituted by the Wage and Hour Division against the Cornucopia Gold Mines Company. In both of such cases, Colonel Fleming stated, the mining company exercised complete control over the operations performed by the lessees.

[fol. 85] The second administrative determination announced by Colonel Fleming today involved the question of determining the number of hours worked by miners in the bituminous coal mining industry.

Colonel Fleming announced that on the basis of an inquiry submitted by the bituminous coal mining industry, the Wage and Hour Division in carrying out its enforcement duties in that industry will accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the particular industry and are supported by a long history of *bona fide* collective bargaining agreements. In view of the circumstances described by the industry in submitting its inquiry, Colonel Fleming announced that practice of computing working time on a "face to face" basis in the bituminous coal mining industry would not be unreasonable. Colonel Fleming explained the term "face to face" to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the place of work and the time spent in returning from the working place to the portal in the evening. The Administrator added that the determination in the bituminous coal mining industry should not be considered to apply to any mining operations where the traditional practice of computing hours worked differs from the custom in the bituminous coal mining industry.

[fol. 86] PLAINTIFF'S EXHIBIT No. 22

For Release Wednesday, September 18, 1940

U. S. Department of Labor, Wage and Hour Division
Washington

Address Scheduled for Delivery by Colonel Philip B. Fleming, Administrator, Wage and Hour Division, U. S. Department of Labor, before the American Mining Congress, Colorado Springs, Colorado, Wednesday, September 18, 1940

[fol. 87] Perhaps you have heard the sotry of the international commission which once decided to write a treatise on the camel.

Each of the collaborators retired to his library or his laboratory, and in due time the Englishman emerged with a two-volume work entitled, "The Camel in Commerce and Industry." The Russian produced a substantial tome entitled; "The Contribution of the Camel to World Revolution." The Frenchman's contribution was a sprightly little book entitled, "The Love Life of the Camel". But it was not until 25 years later that the German was prepared to publish his researches with a 12-volume definitive treatise under the simple caption of "Das Famel."

If you were to ask the first dozen men you meet what they think of the Wage and Hour Law you would, in all probability, get a variety of answers. One man would tell you that it is the greatest contribution in many years to industrial democracy. Another would point to its usefulness in removing some of the causes of industrial conflicts. Still another would emphasize the beneficial effects upon the national health and morale. A workingman whose income has been directly increased to a point where he is able to move into a better house, to better feed and clothe his family, would tell you that the Wage and Hour Law is a very fine thing indeed; and th-t it is curious nobody ever thought of it before. A girl who in 1938 was working in a factory 60 hours a week for $5 and who now works 42 hours a week for $12.60, would point with gratitude to her increased leisure and the fact that she no longer has to be partially supported by charity. The merchant would tell you that the law has better distributed mass buying power so that he now does a greater volume of business at greater

profit. One manufacturer would assert that the law has [fol. 88] saved him from bankruptcy by lopping off competition based upon starvation wages, but another would point only to his greater labor costs, assure you that the Wage and Hour Law is going to wreck the country's economy, and declaim that this unconscionable interference with business has got to stop.

Much depends upon the point of view. You may recall that other story about the inquisitive old gentleman who stopped at the site of some construction that was going on and asked one of the workmen, "What are you making?" And the workman said, without glancing up, "Four dollars and seventy-five cents a day." He asked another, who replied, "I am making some mortar for the use of the stone-masons." But a third drew himself up proudly, turned his gaze heavenward, and said, "I am building a cathedral."

As to any piece of social legislation designed to build a better and happier and stronger country, what each man tends to think of it depends upon whether it is going to gore his own private and particular ox, or help to fatten him.

In other words, to change the metaphor, I think each of us tends at times to permit the trees to obscure our view of the forest. This tree may be a gnarled and knotty old oak, and that one a straight and stalwart pine, but beyond them both the forest still stands in all its splendor.

Whether we personally like or dislike the Wage and Hour Law, it is a good thing to stop occasionally and re-examine the conditions in this country that brought about its enactment, and to remind ourselves just what it was that Congress and the people expected it to accomplish when they wrote it on the statute books.

Here is one industrial establishment in which wage rates [fol. 89] are so low that the workers cannot exist without the supplement of charity or relief. And here is another establishment in the same industry in another part of the country which wants to pay better wages. But if it does pay higher wages it will be at a great disadvantage in competing with the rival firm with the low wage rates. Aside from the purely humanitarian considerations, does any responsible businessman want to see the starvation wage virus creeping across the country, as it used to do,

until it contaminates all of industry and interferes with the free flow and orderly marketing of goods in commerce?

Again several million men and women were out of work in the United States through no fault of their own. But at the same time there were men and women in certain industries who were being required to work 60, 70, and even 80 hours a week. When such long hours of toil are permitted to obtain in one place, is it not likely that they will be spread by the competitive struggle to other places? Would it not be better to place some limit on the working week so that more people can be employed?

Strikes and industrial disput-s, which certainly are not good for the industry of the country, frequently have been fomented by starvation wages and too long hours of employment. Would it not be a good thing for industry, as well as for the country as a whole, to prevent some of those industrial conflicts by removing one of their most provocative causes?

These are the improvements in our traditional ways of doing business that the Wage and Hour Law was intended to bring about. Are they desirable improvements? Do you know of any better way in which they could have been achieved than the way that was employed; by placing at least a minimum floor under wages and by setting a limit [fol. 90] to the length of the workweek—at the same time permitting the employer to exceed the maximum workweek, whenever he feels that necessity requires, upon paying, as a penalty for the privilege, wages at the rate of time and a half for the excess hours? I do not know of any way in which the benefits desired could have been achieved except by placing all of industry covered by the Act upon exactly the same basis in these matters, with such exceptions and deviations as might be necessary to prevent the substantial curtailment of employment or earning power, which would have defeated the purpose of the Act.

Congress recognized that American industry is diverse and that flexibility is essential in the administration of any law designed to apply to all of it in interstate commerce. I feel that Congress provided rather generously for such necessary flexibility, and while all of it is not available to your industry, some of it is.

For example provision was made for the employment of learners, apprentices and handicapped workers at wages less than the minimum. A method was devised for the par-

tial relaxation of the hours requirements in industries found to be seasonal, and this relaxation has been applied to certain gold placer operations. Certain industries are wholly exempt from the hours provisions or from both the minimum wage and maximum hours. Certain occupations were exempted from both the wage and hour provisions—such as those of executives, professional workers and outside salesmen. Provision was made whereby partial relaxation from the hours requirements may be obtained under certain types of collective bargaining agreements. This should be of considerable interest to the mining industry. Finally, the hours standards are not hard and fast limitations. Employees can be worked any number of hours a week, provided only that time and a half is paid for work [fol. 91] in excess of the statutory maximum.

I am under the impression that no other industry has presented more complicated problems of compliance to us than metal mining. Almost daily we receive a letter or telegram from somebody in the industry asking for an opinion, or an interpretation, or suggesting some arrangement of hours and wages which he wants us to approve as meeting the requirements of the Act.

One might conclude from this mass of correspondence either that metal mining doesn't want to comply with the law and is looking for a loophole, or that the nature of the industry is such that compliance is more troublesome than in other industries. Let me say at once that I entertain no suspicion that the former may be the correct explanation. I know too many people in metal mining to believe for a moment that the vast majority of the employers are trying to avoid compliance. The very fact that so many of you have written to us in itself is rather conclusive evidence that this matter weighs upon your conscience. If you had not wanted to comply you wouldn't have taken the trouble to tell us your troubles; you would simply have gone along in the old way and waited until we caught you.

No, I think the real esplanation is that the industry really is different. In all the country there is no other quite like metal mining.

A part of your difficulty and ours arises from the very nature of the mining industry itself. It is carried on under many varying conditions of climate and geography. There are low grade mines and high grade mines. There are mines operating near large and populous cities; and mines

back in the mountains apart from the main currents of American life. To apply to all of them a single standard [fol. 91a] of labor conditions is admittedly difficult.

But part of the difficulty, I think, is also due to psychological factors and to custom and tradition. Mining in this country always has been a hazardous undertaking, not only for labor but for capital, too. A good deal of it is carried on in small camps isolated from the rest of the world and in which the manners and customs and values associated with living in populous communities do not seem to apply. An industry which has found it necessary to develop its own disciplines would naturally find it difficult to accept regulation imposed from without.

Only in a few exceptional instances are you having trouble about meeting the minimum wage requirements of the Act. Wages in metal mining generally are far in excess of the present 30-cents-an-hour minimum of the statute. Your problems are related almost solely to time-and-a-half for overtime.

The contention with which we most frequently are confronted is that, especially in many of the small, low grade mines, you find it difficult to pay time and a half for hours worked beyond 42 a week and still meet your operating costs, to say nothing of making a profit.

It was the intention of Congress, by putting a penalty upon overtime work, to encourage the employment of additional labor. It was a spread-the-work device. It was assured that imposition of the overtime penalty would encourage employers to eliminate overtime and employ extra workers. But here we meet the contention that this objective is not possible in metal mining because of the difficulty encountered in staggering shifts or in developing a swing-shift operation so that the mine can operate on a six or seven-shift per week basis. The difficulty of pro- [fol. 92] viding additional housing for more employees is put forth as a vital factor. Besides, much of the underground work is highly skilled and can be done effectively only by one worker or one group of workers. It would be dangerous to attempt to solve the overtime problem by sending into the mines men who are unfamiliar with the customary techniques and the lay-out of the mine shaft. Not only is it prohibitive to pay time and a half for work in excess of 42 hours a week in many cases, but we have been told that the men themselves don't want a 42-hour

week. Many of them are living in remote mining camps and they would much rather put in long hours while at work and save up until they can take time off to go to town.

I should hesitate to attempt to furnish an off-hand solution to every problem that has been presented to us, but I want to list some of the principal ones as a basis, for further discussion.

1. Must the time spent by the underground worker in traveling from the portal to the face be counted as time worked?

2. Must time spent at lunch underground be considered as time worked?

3. What is the status of the lessee miner, or the leaser? Is he an employee of the mine owner or really a lessee? Must he and his helpers, whom he employs, and pays, be paid time and a half for overtime?

4. What deductions from wages will be considered by the Administrator to be reasonable?

5. Will the operator be protected from liability if he reduces the hourly rate to avoid the payment of overtime?

6. How about the construction employee—the carpenter who produces no goods for commerce, but merely [fol. 93] builds new bunk houses, or a drying room, or a recreation hall? Is he covered by the law and must he be paid time and a half for overtime?

We cannot predict in advance just what the courts are going to say in respect to every problem that arises. The best we can do is to tell you what, in our opinion, the law means, and what, as to any particular problem, the courts have held in the past in analogous, or somewhat similar, circumstances. The case of the Cornucopia Gold Mine Corporation, however, may be worth citing, because it involved many of the questions which have been raised by other mine operators.

The Cornucopia corporation owns and operates a mining property near Cornucopia, Oregon. There is no railroad nearer than 27 miles, and the largest "big town" is Baker, Oregon, which has a population of around 8,000 and is 75

miles away. This certainly may be considered an isolated mining property. The company was organized in 1930 and it is operating mines which previously had been worked but abandoned. The company did not commence operations until 1936. It lost money that year and also in 1937, but made a profit of about $122,000 in 1938, and, at the time of our investigation, it was estimated that about the same amount of profit would be made in 1939. Our inspector commented that "the officers and directors appear to be responsible individuals engaged in a legitimate enterprise."

The violations of the law which were reported upon inspection were all related either to overtime or the record-keeping requirements.

About October 24, 1938, when the Wage and Hour Law [fol. 94] became effective, the company placed all of its employees on an hourly basis, although before that they had been on an eight-hour shift arrangement. The employees worked 48 hours one week and 56 the next, alternately. However, the new hourly rate was so arranged as to provide approximately the same income as before, and if the exact amount was not arrived at by these calculations, then an arbitrary adjustment was made in some instances to bring the wage up to a sum equivalent to the income as it would have been if figured at the regular daily wage. The question here was, What was the regular rate of pay and did the company pay one and a half the regular rate for overtime since the law became effective? We reached the conclusion that the regular rate of pay was not changed and that, hence, nothing extra was paid for the overtime as required by law.

This pay plan was in effect for 91 surface workers until September 19, 1939, but for the 97 underground workers a new system was devised November 15, 1938. This new system provided that the underground miners would continue to work the same shifts as before the Act became effective. There were two shifts a day and the miners went underground either at 7 P. M. and came out at 3:30 P. M., or in at 7 P. M. and out at 3:30 the following morning. This shift arrangement constituted a total of eight and a half hours spent underground, of which 30 minutes was deducted as a lunch period, leaving a net of eight hours worked per shift. For this the men were paid a set shift wage of $3.50, $4, or $4.50 a day. But the new system provided that the employees show only six hours per shift on their time cards, which they kept themselves and turned in each day. The company then

re-established the old shift rates. There could be no overtime because the most that could be worked, even for seven [fol. 95] shifts a week, was 42 hours. The company's theory was that this was a proper keeping of time because it was maintained that two hours were consumed in traveling through the tunnel of the mine to the place where the miner actually worked. In other words, time spent in traveling from portal to face and from face to portal was not considered by the company to be time worked. It is interesting to note that while the company recorded that each man spent exactly two hours a day traveling underground, our own investigation showed that no miner actually spent more than 90 minutes. But, in any event, the question here was whether the time consumed from portal to portal, or only the time actually spent at the face, was to be considered time worked. Our own contention was that time consumed from portal to portal was hours worked, and that for these men the company had failed to pay extra for overtime and had failed to enter on its records the time actually worked.

The company insisted that only 188 employees were directly employed and that 87 were either lessees (or leasers) or employees of leasors, for whom the company was not responsible. We believed that these leasers and their helpers were bona fide employees of the company and had a right to look to it for compensation for their overtime. The normal incidents of the employer-employee relationship existed even though the company called the workers "lessees."

In regard to this question of the status of lessees under the Wage and Hour Law, I anounced in July a determination made at the request of metal mine operators and lessees of such operators in the intermountain States. I stated that each case must be determined on its particular facts, with primary importance given to the terms of each individual lease agreement and the method of operation under such agreement. If under the lease agreement control and [fol. 96] supervision over the operations of the so-called lessee are reserved to the lessor, such lease agreement embodies the normal incidents of the employer-employee relationship and the so-called lessees will be considered as employees under the Fair Labor Standards Act.

On the other hand, if a particular lessee is operating mining property which is not a part of the property cur-

rently being operated by the mining company with regular employees, and if in the lease agreement the mining company does not have the right to control the lessee in his operation of the mining property, it may well be that the lessee is not an employee of the mine owner but is in fact an independent operator of such property. However, I pointed out that if such lessee has his own employees who assist in the operations of the leased mine, such employees must be paid in accordance with the Fair Labor Standards Act if the products of the mine move in interstate commerce. In the ordinary case the mine owner retains title to the ore mined by the lessee and his employees and ships the product of the leased mine, along with his own, in interstate commerce. Therefore, if the lessee does not pay his own employees in accordance with the requirements of the Fair Labor Standards Act, Section 15(a) (1) (the so-called "hot goods" section) prohibits the mine owner from shipping the product of the leased mine in interstate commerce.

Two courts recently have held lessees of mining property to be employees of the mine owner. One of the cases was decided by the Supreme Court of Utah under the Utah Unemployment Compensation Act, designated as "*National Tunnel and Mines Company* v. *Industrial Commission of Utah.*" The other decision was under the Fair Labor Standards Act and was rendered by a Federal Judge in Oregon as a result of the proceedings instituted by the Division against this same Cornucopia Company. In both cases the mining company exercised complete control over the [fol. 97] operations performed by the lessees.

In the Cornucopia case there were 34 employees whom the company claimed were not subject to the Act on the ground that they were employed in constructing a dry room, a recreation room and company house, which employment it held was neither interstate commerce nor the production of goods for interstate commerce. Our Attorneys believe that repairs or alterations to existing structures used in the production of goods for interstate commerce are covered by the Act, whereas the construction of entirely new structures may be exempt. The employees engaged exclusively on new construction work were held not to be covered by the law but the employees who were spending part of their time in this work and part in employment clearly subject to the Act were held to be covered.

These were the matters which comprised the substance of our case against the Cornucopia Gold Mines, and these were the practices which the court enjoined the company from continuing. The court directed the payment of approximately $13,000 in restitution to some 263 employees. I might add that this was a consent decree, and that the company did not challenge the validity of our interpretations and conclusions.

The portal-to-portal matter also has been presented to us by the bituminous coal mining industry. In response to inquiry I said that the Wage and Hour Division, in carrying out its enforcement duties in that industry, will accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the industry and are supported by a long history of *bona fide* collective bargaining agreements. In view of the circumstances described by the industry in submitting its inquiry, I announced that the practice of computing [fol. 98] working time on a "face-to-face" basis in bituminous coal mining would not be unreasonable. The term "face-to-face" was explained to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the place of work, and the time spent in returning from the working place to the portal at the end of the shift. This determination in the bituminous coal mining industry should not be considered to apply to any mining operations where the traditional practice of computing hours worked differs from the custom in bituminous coal mining. In the Cornucopia case, for example, custom and tradition had long recognized the portal-to-portal basis of reckoning time worked.

We are not yet disposed to take any particular position as to whether the half hour spent eating lunch underground may be deducted from hours worked. The problem is a very difficult one because the employee is required to eat under very unfavorable conditions and is subject to many of the hazards of his job while eating. On the other hand, we recognize that the employee does have time off in order to have lunch and an argument can be made that such time need not be considered as hours worked. But as I say, the Division is not prepared at the present time to make any definitive determination on this question.

Deductions from wages are a recurring source of irritation, but the problem seems to be more acute in coal mining than in metal mining. The law, as you know, defines the wage paid to the employee to include the reasonable cost to the employer, as determined by the Administrator, of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are [fol. 99] customarily furnished by such employer to his employees. Our regulations on the subject state that "reasonable cost" shall not include a profit to the employer, and that the cost of facilities, such as tools, furnished to the employee not for his benedit but for the employer's, may not be deducted from wages, if such deduction "cuts into" the minimum wage or compensation for overtime. An example of deductions which we could not wholly approve was reported by one of our inspectors in Pennsylvania. A coal miner, who had worked 77 hours in a two-week period for which his earnings were $79.79, was charged 77 cents for lamps, 52 cents for smithing, $3.55 for powder, 75 cents for Social Security taxes, $1.26 for the union check off, 55 cents for bath, $1.50 for hospital dues, $1.50 for medical service, $60.09 for his account at the store, $8.10 for rent, 20 cents for the baseball fund—a total deduction of $78.79, leaving exactly $1 in cash in his envelope. In this case we disallowed the charges for lamps, smithing and powder and that proportion of the store account that represented a profit to the employer. But so long as such non-deductible items do not "cut into" the minimum wage of 30 cents an hour and no question of overtime is involved, there is no violation of the Act.

Will the operator be protected from liability if he manipulates the hourly rate to avoid the payment of overtime? A rather familiar example of this particular device is illustrated by the case of the employer who, at the time the Act became effective, was paying his employees $4.50 for a normal work day of eight hours. A normal workweek consisted of seven workdays. Thus, the employees earned $31.50 for a workweek of 56 hours. But the employer calls his employees together and makes a little speech. He tells them [fol. 100] that it is necessary for him to pay them on an hourly rate. He has decided, he says, to pay them 50 cents an hour for the first six hours of each workday, and 75 cents (time and a*h* half 50 cents) for the seventh and eighth hours. He asks them to agree to this new wage schedule.

Since the plan means no change whatever in either hours or total earnings, the employees may accept it. The difficulty with this little scheme, however, is that it is a mere subterfuge.

The division of a normal 8-hour day into 6 "straight time" hours and two "overtime" hours is purely fictitious. The employee is not actually being paid at the rate of 50 cents an hour and the alleged overtime rate of 75 cents is not paid for overtime work. He is simply getting, as he always got, $4.50 for an 8-hour day and his regular rate of pay continues to be 56 cents an hour.

This employer does not comply with section 7 of the Act unless he pays his employees 84 cents an hour (time and onehalf 56 cents) for each hour they work in excess of 42 hours a week, or a total of $35.28 for a 56-hour week.

That this is so becomes apparent when one stops to reflect about the purpose of the law. The Act is not intended to force employers to pay more money to their employees who work overtime. The Act seeks to induce employers to reduce hours by making overtime work more costly. Thus, if an employer reduced the hours worked by his employees from 56 to 52 or less during the first year of the law, to 51⅓ or less during the second year, and to 50-2/3 hours or less after this coming October 24, he could continue to pay $31.50 a week, the salary he paid for a 56-hour week prior to the Act, and still be in strict compliance. It can hardly be said that a law which in the case we have sup- [fol. 101] posed, requires a reduction of 4 hours a week during the first year of its existence, an additional 40 minutes a week during the second year and another reduction of 40 minutes a week during the second year and another reduction of 40 minutes thereafter is seriously burdensome.

In general mine operators have attempted to meet the hours requirements of the Wage and Hour Law by one or another of three types of adjustments: They have reduced the number of shifts to five a week of eight hours each; or they have shortened the shift to approximately seven hours; or they are paying the overtime above 42 hours a week. When the 40-hour provision becomes effective in October it will require the payment of overtime or the cutting of shifts to five a week, at some increase in labor costs, unless this is compensated for by the greater

productivity of the workers, as has been the experience of at least one large mine studied by our economists.

Mine operators frequently assure us that their employees are not in sympathy with the maximum week provisions, that they would much rather work 56 or even 70 hours a week at straight time than run the risk of having their total earnings reduced because of the reluctance of employers to pay for overtime. I certainly do not question the good faith of those mine owners and managers who give us this assurance, but the weight of the evidence which comes to us from the miners through their own spokesmen is on the other side. The International Union of Mine, Mill and Smelter Workers indorses the Act, including its present overtime provisions, and we have received many letters from individual miners to the same effect. Several months ago a representative of the Wage and Hour Division made extensive inquiries in Montana and while he [fol. 102] was told that some miners were anxious to put in long hours at straight time, he says he did not succeed in meeting any of them. The fellow who enjoyed working overtime without extra compensation was pretty illusive. He was always over in the next county or in some other part of the state.

In the course of his report this Division representative wrote (and I quote): "I found an interesting situation in Butte. When the Wage and Hour Act first went into effect the Anaconda Company made a forty-hour week immediately effective. The miners formerly were worked 48. The change resulted in the loss of a day's pay each week, but it also resulted in the employment of about 800 additional miners. Considerable agitation was caused by the change, and the miners' pay was so materially reduced that there was a great deal of dissension. However, a wage and hour committee was appointed representing all the unions in the Butte area, and numerous meetings and hearings were held. As a result of the agitation the Anaconda Company offered to return to the 48-hour week and pay the miners time and a half for the hours in excess of 44. (This was before the 42-hour week became effective.) When this proposal was received it was submitted by the wage and hour committee to all the unions in Butte, who took a vote on it. The Teamsters' Union voted in favor of the 48-hour week, but all the other unions in Butte voted conclusively against it, and the vote of the miners' union was almost

unanimously in favor of the 40-hour week. Butte furnishes an excellent illustration of one place where the Act succeeded in spreading employment in an effective way.

"Because of the statements made to me by miners who are themselves in favor of the 40-hour week, I would give full credence to their estimate indicating that some 10 or 15 per cent of the miners in the isolated mines would favor [fol. 103] a longer day. It is significant, however, that in my trip around the state I could not find a single miner who favored it. I believe, however, that when investigations are made it will be found that many violations of the Wage and Hour Law now exist in the isolated mining districts where miners are found employed under many types of contracts. This will be found to be true, I believe, not because of any desire to violate the law, but because, as a matter of custom and convenience, miners in the small camps have been accustomed to work in a haphazard fashion."

I trust I have been able to show you that we are fully aware of most of the problems that perplex you under the Wage and Hour Law. I regret that I am not able on the spur of the moment to produce a sure-fire, litigation-proof answer to every question that you may be able to ask. I do not think that anybody can do that. Some of those questions can be answered finally only by the courts.

It would be pleasant, too, if I could show each of you how you can comply with the law without it costing you a single cent. But I can't do that, either. I don't think Congress expected that you were going to be able to comply without it costing you something. The Wage and Hour Law is social legislation in the broad sense, and like most other good things the attainment of its objectives involves some sacrifice to somebody. It was expected, however, that, though some employers might have to pay more for labor, they, in common with the rest of us, would benefit in the long run from increased mass buying power, better national health, and the greater contentment of workers. These benefits we are now beginning to enjoy.

I think it fair to point out, too, that the price of metals generally has been rising for the last two years. The im-
petus given to business by the great national defense pro-
[fol. 104] gram, in which metals of all sorts are vitally needed, will be especially to the advantage of the mine operators. I might also say that your government for

some years, due to its monetary policies, has been subsidizing gold and silver mine owners. Indeed, but for these subsidies, many mines that are operating today and producing rather handsome profits would still be closed.

Some have felt that the war and our necessity for building up the national defense have so radically changed the industrial situation in this country that we shall have to relax the hours requirements of the Wage and Hour Law. The argument runs that while there is an admitted oversupply of idle labor willing and anxious to go to work, there is an acute shortage of skilled labor and that we must permit the skilled labor already on the job to work overtime without paying time and a half for the overtime.

I have discussed this matter several times recently and I do not want to prolong these remarks unduly by undertaking an extensive treatment of it here. Perhaps it will suffice to repeat that in my opinion no relaxation of the overtime provisions of the Act at this time is either necessary or desirable.

It may be natural to assume that if a man can perform so much work in one hour he can perform 60 times that amount of work in 60 hours, or 70 times in 70 hours. But that doesn't happen to be true, as our own experience in the World War, as well as England's experience both in that conflict and in the present war, amply demonstrates. The Chief of Ordinance and the Quartermaster General of the United States Army both urged restriction of working hours in the World War. Careful studies made in England [fol. 105] showed that labor did not produce as much under the 60 hour week as in a shorter work-week, and 45 hours seems to have been about the optimum, beyond which production fell off, or the workmen, due to fatigue, spoiled about as much material as they satisfactorily completed.

Even if it were true that there is a shortage of skilled labor today, common sense argues the necessity of training more workers now while we have the time for it. If we use up our available supply of skilled labor by requiring long hours of overtime at the beginning of our defensive effort, we will have no reserve to fall back upon later when our situation may be more critical. The overtime penalties of the Wage and Hour Law provides an important incentive to employers to begin training additional workers. The possibility of lengthening working hours forms reservoir

which we should draw upon sparingly and only as a last resort.

An editorial by Charles F. Willis, Editor of the Mining Journal, reflects, I like to think, the best opinion of the industry.

"While the person who thinks that the Wage and Hour Law, and other reform legislation, is all bunk and unnecessary may feel inclined to give as his answer, 'Repeal the whole —— thing!!" he wrote, "We must recognize the fact that the idea of a floor for wages and a ceiling on hours is here to stay. We can travel farther by determining among ourselves just how that principle can be retained, yet fitted to an industry that requires continuous operation in remote places.

"It is urged that those who are conducting mining operations, and who have had trouble in making the present law fit their own situation, advise the investigators of their [fol. 106] difficulties * * * and maybe, out of the mass of facts gathered, an answer will be found whereby the mining industry can be granted the changes necessary to make the law workable. If, after cooperating and trying to find the answer and retain the principle, it still cannot be made to operate without undue hardship on both employee and employer, the remedy of repeal is still open.

"The mining industry has no quarrel or trouble with the wage provisions, as it pays far in excess of the minimum provided, but the hours provisions create many problems and inflict much hardship upon both the owners and workers in the metal mines. It is not an unsolvable problem, but can be worked out better by getting our heads together in consultation rather than butting them against each other." So wrote Mr. Willis.

I, too, feel that the principle of a floor under wages and a ceiling over hours is here to stay. I suggest, therefore, the fullest cooperation among industry, labor and the Division to bring about the achievement of its purpose.

[fol. 107] PLAINTIFF'S EXHIBIT No. 23

Engineering and Mining Journal

H. C. Parmlee, Editor

New York: A. H. Hubbell, H. C. Chellson, Associate Editors; H. H. Wanders, Market Editor; J. H. Edwards, Electric Editor; W. N. P. Reed, Assistant Editor; Washington, D. C., Paul Wooton, San Francisco; J. B. Huttl, Assistant Editor; G. J. Young, Consultant; Walter M. Drake, Managing Editor.

Volume 142 April, 1941 Number 4

Collar-to-Collar vs. Face-to-Face

Wage-Hour Administration defends interpretation of "hours worked" in underground metal mines.

Col. Phillip B. Fleming, Administrator, Wage and Hour Division, Department of Labor.

The Editor of Engineering and Mining Journal has asked me to reconcile, if I can, the statements I made in my speech before the American Mining Congress on Sept. 18, 1940, with my recent approval of an examiner's report announcing our opinion that in effect hours worked in underground metal mining include all hours spent portal to portal minus the lunch period. The portal-to-portal opinion is summarized as follows:

> "The workday in underground metal mining starts when the miner reports for duty as required at or near the collar of the mine, and ends when he reaches the collar at the end of the shift.
>
> [fol. 108] "The workday also includes the aggregate of the time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out.
>
> "The workday does not include any fixed lunch period of one-half hour or more during which the miner is relieved of all duties, even though the lunch period is spent underground."

I cannot fully reconcile the two but I can at least explain how my name is attached to the irreconcilable. One of the

first public statements I made on any matter affecting the metal-mining industry was issued in the form of a press release on July 27, 1940, with the title, "Two Mining Determinations Announced." One of these administrative determinations dealt with the subject of lessees, a subject which we are still investigating and on which further announcements may be expected in the future. The other so-called administrative determination was made in answer to an inquiry from the bituminous coal mining industry. Since this is the ancestor of all subsequent confusion it is worth quoting in full. Our press release states:

> "On the basis of an inquiry submitted by the bituminous coal mining industry, the Wage and Hour Division in carrying out its enforcement duties in that industry will accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the particular industry and are supported by a long history of bona fide collective bargaining agreements. In view of the circumstances described by the industry in submitting its inquiry, I announced that practice of computing working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable • • • I added that the determination in the bituminous coal mining operations where the traditional practice of computing hours worked differs from the custom in the bituminous coal mining industry."

When I made my speech in Colorado Springs six weeks later I quoted that statement and I added to it the following sentence:

> "In the Cornucopia case, for example, custom and tradition had long recognized the portal-to-portal basis of reckoning time worked."

[fol. 109] It is the implication of that last statement which has led many mining operators to believe that the Wage and Hour Division would accept the face-to-face practice or some modification of face-to-face or portal-to-portal in any mine where the practice has been carried on for a long time. Because of that assumption many mine operators were surprised at my affirmance of the examiner's report on hours worked in underground metal mining in which I accepted for the Division the position that hours worked in

metal mines should be counted as portal-to-portal minus the lunch period.

I am afraid that I must take the blame for making a misleading statement.

The decision we made last July to accept the face-to-face computation of hours worked in bituminous coal mining was reached with considerable difficulty. However, right or wrong, my bituminous coal opinion was based on a unique situation. Here is a large industry with about half a million employees in which the method of computing hours worked is virtually uniform throughout the industry and has been for many years. Furthermore, it is an industry in which this uniformity in agreement on hours worked has been achieved by national collective bargaining, and arrived at by the employers and the employees year after year in joint meetings which go back for half a century. So far as my knowledge goes the determinaton of working hours has not been established in this way and with such uniformity in any other industry in the United States.

In the underground metal mining the practice with regard to hours is entirely different. Only part of the industry operates under collective bargaining agreements, and the agreements are characteristically made on an individual [fol. 110] mine basis. Different contracts contain different hours provisions. This diversity in practice under union contract is reflected in a diversity of practice in unorganized mines. In practically every state of the Union except the states of Utah and Arizona, where the collar-to-collar system is required by law, and possibly the states of Alabama and Tennessee, the practice in the immediate past has reflected all the different bases for computing hours worked. In a general way I was familiar with this condition when I made my address at Colorado Springs. I suppose that in citing the Cornucopia case, which involved a consent decree agreed to by a mining company for its mine in the State of Oregon, I merely felt that I was giving a single practical example of the type of thing I had in mind. Actually as many mining operators have since reminded me, I gave the impression that the Wage and Hour Division would accept the status quo in each individual mine in the United States as of Oct. 24, 1938, the day the act went into effect, as determinative of hours worked in that particular mine under the Fair Labor Standards Act. Since the date of the speech, we have learned far more about the metal mining

industry than we then knew. We have received reports from our regional offices, made surveys, held public conferences. We know now, and we probably should have realized then, that acceptance by the Division of the individual custom of each individual mine would tend to continue a chaotic condition. It would make permanent a lack of standards instead of establishing the standard contemplated in the law. So, to repeat, if I had realized on Sept. 18, 1940, what I know today, I would not have made the kind of loose statement that appears in the speech.

[fol. 111] The general opinion of the Wage and Hour Division on determination of hours for which employees are entitled to compensation (straight time and overtime) under the Fair Labor Standards Act was originally explained in the Division's Interpretative Bulletin No. 13. This was first issued in May, 1939, and while it has been revised at various times the basic principles that our attorneys drafted then are still the basic principles to which we adhere. The bulletin says:

> "As a general rule, hours worked will include (1) all times during which a*m* employee is required to be on duty or to be on the employer's premises or to be at a prescribed work-place, and (2) all time during which an employee is suffered or permitted to work whether or not he is required to do so. In the large majority of cases, the determination of an employee's working hours will be easily calculable under this formula and will include, in the ordinary case, all hours from the beginning of the workday to the end with the exception of periods when the emplo-ee is relieved of all duties for the purpose of eating meals."

I believe that a fair reading of that paragraph would lead most persons to conclude that the portal-to-portal method of computing hours worked in underground metal mining is the correct one. In the examiner's report the position is taken, and I think correctly, that any meal period of half an hour or more even though underground is not hours worked. On that one point, we have finally expressed an opinion where no opinion was expressed before. As for the rest, I believe that the report which I have adopted is an application to the underground metal mining industry of the principles which we made known earlier in the administration of the act. But even that general state-

ment in the bulletin, sound though it is, has been the source of some confusion. The word "work-place" is used in the bulletin to indicate any place to which an employee may [fol. 112] be sent away from his employer's regular place of business; in metal mining it is customarily used to indicate the spot within a mine to which the miner is assigned. This was clearly not the sense used in the bulletin, but the bulletin has occasionally been thus misconstrued.

This is the history of the Wage and Hour Division position on the collar-to-collar question. What will the Division do about it? First, when the collar-to-collar opinion was approved on March 17, 1941, we stated that for administrative purposes we would consider its effective date to be April 1. Since that time we have realized that it would be fairer to allow a little more leeway to employers to adjust their practices. We have therefore postponed the effective date from the administrative standpoint to May 1, 1941. Second, we have announced that if any employer complies with the wage and hour provisions we will take no action with regard to non-compliance prior to May 1, 1941. Thus any employer whose compliance begins by May 1, 1941, will know that the Wage and Hour Division will not concern itself with the previous method of computing hours worked for his underground employees.

[fol. 113] PLAINTIFF'S EXHIBIT 24

Interpretative Bulletin

No. 13

Hours Worked

Determination of Hours for Which Employees Are Entitled to Compensation under the Fair Labor Standards Act of 1938

July, 1939

United States Department of Labor

Wage and Hour Division

Office of the General Counsel

[fol. 114] Determination of Hours for Which Employees Are Entitled to Compensation under the Fair Labor Standards Act of 1938

General

1. The accurate determination of what constitutes hours worked is essential in order to establish whether the minimum wage and maximum hours requirements of sections 6 and 7 of the act have been satisfied. This bulletin is intended to indicate the course which the Administrator will follow with respect to the determination of employees' hours of work in the performance of his administrative duties under the act, unless he is directed otherwise by the authoritative rulings of the courts or unless he shall subsequently decide that his interpretation is incorrect. The manner of computing minimum wages and overtime compensation which is discussed in Interpretative Bulletin No. 4 is not within the scope of this bulletin.

2. The act contains no express guide as to the manner of computing hours of work and reasonable rules must be adopted for purposes of enforcement of the wage and hour standards. As a general rule, hours worked will include (1) all time during which an employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace, and (2) all time during which an employee is suffered or permitted to work whether or not he is required to do so. In the large majority of cases, the determination of an employee's working hours will be easily calculable under this formula and will include, in the ordinary case, all hours from the beginning of the workday to the end with the exception of periods when the employee is relieved of all duties for the purpose of eating meals.[1] The following specific problems with respect to the determination of hours worked which have been presented for our consideration are not sufficiently answered by this formula, however, and more detailed discussions of these problems are, therefore, set out in the following paragraphs.

Time Clocks

3. Neither the statute nor Regulations, Part 516 (Requirements for Keeping Records) require that time clocks

[1] No opinion can be expressed at this time as to certain cases—e. g., employees engaged in mining or in working under high pressure—where by custom or agreement time spent eating meals is paid for as hours worked.

be used or specify the manner in which an employer has to keep a record of the number of hours worked by his employees. Time clocks where used will be an appropriate basis for recording hours worked only when they accurately reflect the period worked by the employee. Whether or not time clocks accurately reflect the period worked by the employee is to be determined by the formula in the preceding paragraph. It should be noted also that if the employer requires the employees to punch a time clock and the employee is required to be present for a considerable period of time before doing so; such time will be considered hours worked.

[fol. 115] Waiting Time and Employees Subject to Call

4. Many inquiries have been received with respect to periods of inactivity due to the break-down of machinery and time spent in waiting for materials to be furnished or waiting for the loading or unloading of railroad cars or other vehicles of transportation. Generally, the time during which an employee is inactive by reason of interruptions in his work beyond his control should be included in computing hours worked either if the imminence of the resumption of work requires the employee's presence at the place of employment or if the interval is too brief to be utilized effectively in the employee's own interest. This result would not be affected by the fact that the employer tells his employees that they are free to leave the premises. Hours workd are not limited to the time spent in active labor but include time given by the employee to the employer even though part of the time may be spent in active labor but include time given by the employee to the employer even though part of the time may be spent in idleness.

5. Many inquiries have likewise been received regarding employments, the very nature of which involve periods of inactivity for varying lengths of time. Ordinarily such periods of inactivity during which employees are on duty should be considered hours worked. Thus, for example, messenger boys who sit around in the office and wait for messages to be routed out should be considered as working not only when they are actually delivering messages but also while waiting for such messages to be assigned. Similarly, a chauffeur who is required to drive officials of a com-

pany engaged in the production of goods for commerce should be considered as working not only when he is actually driving such officials but also during the time he is obliged to hold himself in readiness to drive. In these cases the employee engages in active work intermittently, but his time is not his own while he remains conveniently available to carry out the instructions of his employer.

6. In a few occupations periods of inactivity need not be considered as hours worked even though the employee is subject to call. The answer will generally depend upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work—i. e., the frequency with which the employee is called upon to engage in work. In these cases, the nature of the employee's work involves long periods of inactivity which the employee may use for uninterrupted sleep, to conduct personal business affairs, to carry on a normal routine of living, etc. A good example of this is the employee of a small telephone exchange operating a switchboard located in the employee's house. During the night no one is in direct attendance at the switchboard and an alarm bell awakens the operator if a subscriber wishes to make a telephone call. The operator has her bed alongside the switchboard and is able to get several hours of uninterrupted sleep every night, as experience over a considerable period of time may often demonstrate. Thus, if over a period of several months a telephone operator has been called upon to answer only a few calls between the hours of 12 and 5 in the morning a segregation of such hours from hours worked will probably be justified.

[fol. 116] 7. In some cases employees are engaged in active work for part of the day but because of the nature of the job are also required to be on call for 24 hours a day. Thus, for example, a pumper of a stripper well often resides on the premises of his employer. The pumper engages in oiling the pump each day and doing any other necessary work around the well. In the event that the pump stops (at any time during the day or night) the pumper must start it up again. Similarly, caretakers, custodians, or watchmen of lumber camps during the off season when the camp is closed, live on the premises of

the employer, have a regular routine of duty but are subject to call at any time in the event of any emergency. The fact that the employee makes his home at his employer's place of business in these cases does not mean that the employee is necessarily working 24 hours a day. In the ordinary course of events the employee has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits. In some cases the employee may be free to come and go during certain periods. Thus, here again the facts may justify the conclusion that the employee is not working at all times during which he is subject to call in the event of an emergency, and a reasonable computation of working hours in this situation will be accepted by the Division.

8. In some cases employees may be subject to call after the completion of their regular working day; employees may be called upon after regular working hours to furnish emergency service to customers. If the employee is required to remain on call in or about the place of business of the company, the time spent should be considered hours worked. If, on the other hand, the employee is merely required to leave word where he can be reached in the event of a call and is not tied down to any particular place, such time need not ordinarily be considered as working at any time during which he is actually making a call and his hours worked would include all time traveling to and from such a call.

Travel Time

9. The problem of travel time, in relation to hours worked, arise in a great variety of situations and no precise mathematical formula will provide the answer in every case. The question is often one of degree; if the time spent by an employee in traveling is reasonably to be described as "all in a day's work," such time should be considered hours worked under the act.

10. As a general rule it may be stated that an employer should treat time spent by an employee during regular working hours in traveling pursuant to the employer's instructions as hours worked. If an employer requests his employee to do a job during regular working hours which requires the employee to leave the place of business, the

traveling time of the employee should be included in hours worked, and this is true whether or not the particular job is within the employee's regular duties.

11. In many cases travel time outside of regular working hours is considered "part of the day's work" and, accordingly, should be treated as hours worked. Thus, an employee whose normal working day extends from 8 a. m. to 5 p. m. may be requested by his employer at 5 p. m. [fol. 117] to make one more outside call which involves 2 hours of traveling time (to get to the place where the work is to be performed and report back to the office) and active labor of 1 hour. In such case the employer may not disregard the travel time in computing the number of hours worked by the particular employee; the employee's working day would extend from 8 a. m. to 8 p. m. In this case the employee engages in active labor for his employer after the close of his regular working day and prior to the commencement of his next regular working day, and his activities between 5 p. m. and 8 p. m. are, under the circumstances, reasonably to be day. The same results, of course, would be reached if the employer requested his employee to report for work 2 hours earlier in the morning to make the one extra call.

12. If a crew of workers is required to report for work at a designated place at a specified hour and all the employees are then driven to the place where they are to perform work, the time spent in riding to such place should be considered hours worked. Similarly, the time spent returning from the place at the close of the day's work should be considered hours worked. In some cases, however, the employer requests his employees to report for work at a specified hour at the place where the work is to be performed instead of at the employer's place of business. In these cases the employee's working time may be considered to begin at the time he reports for work unless the traveling time required in order to reach the place of work is unreasonably disproportionate to the normal traveling time required in reporting for work at the headquarters of the employer. No precise formula will solve this type of situation. What is unreasonably disproportionate depends upon the facts in the particular case and reasonable standards agreed upon between the employer and employee will be accepted for purposes of the act.

13. In some cases an employee is required to travel continuously for more than a full working day during which time the employee is not engaged in actual productive work for his employer. For example, an employee whose regular working hours extend from 8 a. m. to 5 p. m. may be required to spend 2 or 3 days and nights of continuous travel to reach a place where he is to perform assigned work. In such case, as indicated generally in paragraph 10, time spent traveling during the regular working hours should be considered hours worked. Travel time outside of regular working hours need not ordinarily be considered hours worked. If, however, the employee is required to travel on Sundays, Saturday, and holidays, he should be considered as working on these days for the number of traveling hours between his established starting and stopping time on other days of the week. In determining whether the foregoing is applicable, factors such as the length of time required to reach the place where the assigned work is to be performed, whether the employee is given adequate time for sleeping and relaxation the time that the employee is required to report for actual productive labor, etc., are very important.

14. Inquiries have been received with respect to employees who are required to travel continuously for several days and who perform active labor while traveling. Thus, for example, when cattle or poultry, etc., are sent to market by rail, an employee of the shipper is required to travel on the train in order to water and feed the stock en route In other cases an employer who ships machinery by train to a distant customer requires an employee to oil the ma- [fol. 118] chinery en route and otherwise to see that it arrives in perfect condition. The employee generally rides in the caboose with the train crew. In each of the foregoing cases, the employees are subject to call for 24 hours a day, but time required for active work by such employees would ordinarily be much less. The employee generally has a substantial amount of time for sleeping, eating, relaxation, etc.[2] No precise formula will decide this type

[2] The question is obviously one of degree. No opinion is expressed in the case of the relief truck driver. As to the exemption provided by sec. 13 (b) (1) from the hours provision of the act, see Interpretative Bulletin No. 9.

of case and any reasonable agreement entered into between the parties or established by custom and usage which takes into account the amount of time required for active labor by the employee and the fact that the employee is subject to call for 24 hours a day, will be requested by this Division in its enforcement policy.

Meetings and Lectures

15. Time spent in attending meetings and lectures sponsored by the employer (whether or not attendance is voluntary) should be considered time worked if such meetings and lectures are related to the employee's work, as, for example, meetings and lectures for the purpose of teaching the employee the use of new types of machinery on his job, mine rescue, fire prevention and control. In addition, time spent in attending any meetings and lectures should be considered hours worked if attendance is not wholly voluntary.

Employees Having More Than One Job

16. Many inquiries have been received with respect to employees who work for two or more companies. Thus, for example, company A and company B may arrange to employ a common watchman, the employee having the duty of watching the property of both companies concurrently for a specified number of hours each night. In this case A and B are not each required to pay the minimum rate required under the statute for all hours worked by the watchman (i. e., 25 cents an hour each) but A and B should be considered as a joint employer for purposes of the act.

17. In some cases, however, an employee may work 40 hours for company A and 15 additional hours during the same week on a different job for company B. In this case it would seem that if A and B are acting entirely independently of each other with respect to the employment of the particular employee, both A and B, in ascertaining their obligations under the act, would be privileged to disregard all work performed by the employee for the other company. If, on the other hand, the employment by A is not completely disassociated from the employment by B, the entire employment of the employee for both A and B should be

considered as a whole for the purposes of the statute. Whether the employment by A and B are completely disassociated depends, of course, upon the facts in the particular case. This Division will scrutinize all cases involving more than one employment and, at least in the following situations, an employer will be considered as acting in the interest of another employer in relation to an employee: If the employers make an arrangement for the interchange of employees or if one company controls, is controlled by, or is under common control with, directly, or indirectly, the other company.

[fol. 119] PLAINTIFF'S EXHIBIT No. 25

Distances From Mine Portal to Various Mantrip Stations in Jewell Valley Mine

To 1 South Man Station	4,600 ft.
#1 Peakes Branch Man Station	9,500 ft.
#1 Peakes Branch Man Station (Main Entry)	9,300 ft.
#3 Peakes Branch Man Station	11,300 ft.
4 South	8,500 ft.
4 South, Face of 5 East (Where party visited)	10,000 ft.
5 South, 6 East Man Station	10,900 ft.
Main East Man Station	10,580 ft.
3 North Man Station	13,575 ft.
No. 1 Ailey's Branch Man Station	8,500 ft.
No. 2 Ailey's Branch Man Station	14,450 ft.
No. 3 Ailey's Branch Man Station	14,300 ft.

PLAINTIFF'S EXHIBIT NO. 26

Employees Members United Mine Workers, Subject to Contract
Time Required to Be in the Mine, Portal to Portal, at Jewell Valley

July 6, 1943

Section	Time in Mine	Number Loaders	Min.	Number of Co. Men	Min.	Min. of Loaders	Min. of Co. Men
First South	7:20-3:40	9	@ 50'	7	@ 50'	450	360
Peakes Branch	7:20-3:50	42	@ 50'	15	@ 60'	2520	900
4 South	7:20-3:55	26	@ 65'	14	@ 65'	1690	910
5 South	7:20-3:55	14	@ 65'	6	@ 65'	910	390
Main East	7:20-4:00	35	@ 70'	13	@ 70'	2450	910
2 North	7:20-4:05	20	@ 75'	10	@ 75'	1500	750
2 Ailey's Br.	7:20-4:10	23	@ 80'	9	@ 80'	1840	720
3 Ailey's Br.	7:20-4:10	10	@ 80'	5	@ 80'	800	400
1 Ailey's Br.	7:20-4:00	9	@ 70'	4	@ 70'	630	280
Slate Crew	7:20-3:58			5	@ 68'		345
Pumpers	7:20-3:58			2	@ 68'		136
Slate Drillers	7:20-3:58			6	@ 68'		406
Machine Men	7:20-3:58			16	@ 68'		1082
Wire Men	7:20-3:58			4	@ 68'		272
Swing Motors	7:20-3:40			4	@ 50'		200
Main Line Track	7:20-3:38			4	@ 48'		432
Main Line Motors	Work 7 hrs.			9			
Brattice Men	7:20-3:58			4	@ 68'		272
Total		Loaders		188	@ 68'	12790	
		Company Men		133	@ 65.9'		8755
		Total		321			21545 Min.
		Avg.		1 man			67.1 Min.

Outside Employees

	No. Men	Hours
Headhouse	8	7
Hoistmen	2	7
Sand Dryers	3	7
Maintenance & Shop	9	7
Slate Dump	4	7
Lower Tipple, 2 Shifts	17	7
Lamphouse	2	7
Outside Labor	4	7
	49	7

[fol. 121] PLAINTIFF'S EXHIBIT No. 27

Estimated Time—Portal to Portal—No. 1 Mine

Section	Number Men			Minutes	Minutes X Men
	Loaders	Co. Men	Total		
1 North	15	6	21	120	2520
Main Parallel	12	6	18	120	2160
Bearwallow	14	7	21	120	2520
1 North (night)		4	4	60	240
1 North Parallel	7		7	60	420
1 North Drainway	20	6	26	60	1560
1 North Main	26	10	36	90	3240
1 North Parallel	17	6	23	90	2070
Gravel Branch	25	10	35	120	4200
2 North	14	6	20	110	2200
Bearwallow Main	16	10	26	110	2860
3, 4 Rt. Bearwallow	13	5	18	110	1980
Bearwallow Parallel	31	13	44	120	5280
5 Rt. Bearwallow	17	6	23	120	2760
6, 7 Rt. Bearwallow	13	6	19	110	2090
	240	101	341		36,100
#4 Mine	27	10	37	30	1,110
	267	111	378		
Main Line Track		11	11	30	330
Slate Crew		3	3	45	135
Main Line Motormen		4	4	100	400
#4 Machine Men		2	2	30	60
Machine Men, Tonnage		14	14	120	1680
Night Foremen's Men		17	17	60	1020
Pumpers		3	3	100	300
Night Dispatcher's Men		6	6	80	480
		60	60		4405
Slate Dump Men		6	6	20	120
	267	177	444		41,735
Less: 50 men enter mine at driftmouths closer to their work than main driftmouth — 50 min. less per man 50 men x 50 minutes each					2,500
					39,235

39,235 ÷ 444 men = 88 min. per man

Outside Employees

Slate Dump	6
Sand Dryers	3
Tipple	25
Shop	43
Power House	9
	86

[fol. 122]

PLAINTIFF'S EXHIBIT No. 28

No. 1 Mine

Name of Bus Operator	Number of Mine Workers Transported	Route	Mileage
John Justice*	16	Pine Creek, Raven, Richlands, Jewell Ridge	64 mi. round trip
Robert Thompson*	18	Honaker, Swords Creek, Richlands, Jewell Ridge	52 mi. " "
B. H. Smith*	16	Middle Creek, Stinson Ridge, Jewell Ridge	28 mi. " "
Levi Hampton*	16	Baptist Valley, Cedar Bluff, Richlands, Jewell Ridge	40 mi. " "
Byrd Burress*	10	Cedar Bluff, Richlands, Jewell Ridge	35 mi. " "
Raymond Street*	10	Tazewell, Richlands	64 mi. " "
Wesley Johnson*	14	Raven, Richlands, Jewell Ridge	26 mi. " "
C. C. Selfe (Bus)	36	Richlands, Seaboard, Jewell Ridge	18 mi. " "
C. C. Selfe (Bus)	26	Richlands, Seaboard, Jewell Ridge	18 mi. " "
C. C. Selfe (Bus) (Nite)	14	Richlands, Seaboard, Jewell Ridge	18 mi. " "
	176		363

* The vehicles marked with * are pickup trucks from ½ ton to 1½ ton capacity with cabs bu lt on chassis.

No. 2 Mine

		Claim for gasoline	
Robert Thompson*	14	Honaker, Swords Creek, Jewell Valley	72 mi. round trip
Chap Lester (bus)*	30	West Raven, Richlands, Jewell Valley	65 mi. " "
Chap Lester*	14	Swords Creek, Richlands, Jewell Valley	56 mi. " "
Frank Shull (bus)*	30	Keen, Mt. Shorts Gap, Jewell Valley	64 mi. " "
Frank Shull*	14	Keen Mt. to Bus (Shuttle)	
Jno. L. Keene*	12	Browns Ridge, Jewell Valley	30 mi. " "
Pat Monaghan*	13	Bradshaw, Jolo, Jewell Valley	40 mi. " "
George W. Day (Bus)	14	Keen Mt., Bill Young Gap Valley	72 mi. " "
Co. Bus	32	Laurel Creek, Whitewood, Jewell Valley	30 mi. " "
Co. Bus (Nite)	10	Wards store below Whitewood, Jewell Valley	45 mi. " "
C. C. Selfe (Bus)	26	Richlands to Jewell Valley	33 mi. " "
C. C. Selfe (Bus)	17	Raven to Jewell Valley	40 mi. " "
C. C. Selfe (Bus)	19	Raven to Jewell Valley	33 mi. " "
	245		580

[fol. 123] PLAINTIFF'S EXHIBIT No. 29

Western Union

March 22 PM 5 20

326/321—The White House
Washington DC 22 355P

Edward R. Burke
Negotiating Committee Southern Appalachian Wage Conference NYK

The dispute between the United Mine Workers and the Bituminous Operators must be settled like any other labor dispute under the National no strike agreement of December 26, 1941, by the peaceful means set forth in the Executive Order No. 9017 of January 10, 1942; that is, by collective bargaining, conciliation and final determination, if necessary, by the National War Labor Board. From telegram I have received from the committee representing the operators and from the press reports of various proposals made at the conference, it is evident that the time remaining before the expiration of the contract on March 31 is too short. I, therefore request the mine workers and the operators to follow the plan adopted at my suggestion in 1941; that is, to continue the uninterrupted production of coal under the terms and conditions of existing contracts until the differences that now separates the parties are peacefully and finally resolved with the understanding that if the new agreement includes any wage adjustments such adjustments shall be computed and applied retroactively from April 1, 1943. If any wage adjustments are made they must of course be made in accordance with the Act of October 2, 1942, and Executive Order No. 9250. It would be unfair to the mine workers and to the operators unduly to prolong this period of uncertainty and I am, therefore, asking everyone concerned to proceed with all speed consistent with the complete and fair minded settlement of the dispute. If it is referred to agencies of the government I shall make the same request of those in charge of such agencies. If there is a wage adjustment within the Standards set forth in the Act of October 2, 1942 and Executive Order No. 9250, the question of undue hardship to individual operators resulting from the agreement to make such adjustments retroactive to April 1, 1943, will be given due consideration by the agencies of Government concerned with costs and prices.

(Signed) Franklin D. Roosevelt.

[fol. 124] PLAINTIFF'S EXHIBIT No. 30

March 29, 1943.

Southern Appalachian Joint Wage Conference

It is agreed that the mines represented in this conference shall continue in operation under all existing agreements for thirty (30) days after April 1st, 1943, in accordance with the request of the President of the United States, as affecting a continuation of work on a retroactive basis.

Negotiating Committee, United Mine Workers of America, Southern Appalachian Joint Wage Conference: (Sgd.) Percy Tetlow, Wm. Turnblazer, John Saxton, Geo. J. Titler, Sam Caddy, John L. Lewis, John O'Leary, Thomas Kennedy.

Operators' Negotiating Committee, Southern Appalachian Joint Wage Conference: (Sgd.) Edward R. Burne, H. A. McAllister, F. M. Medaris, Hal M. Scott, M. L. Garvey.

Southern Appalachian Joint Wage Conference by (Sgd.) Laurence E. Tierney, Jr., Chairman.

Attest: (Sgd.) Paul K. Reed, Secretary.

[fol. 125] PLAINTIFF'S EXHIBIT No. 31

Western Union

(42)

1943 April 23 PM 3 55

HJ 131 98 Govt 2 Duplicate Apl 22

Edward R. Burke, Chairman Southern Appalachian Joint Conference Report Delivery.
Commodore Hotel

The National War Labor Board hereby requests all parties to the dispute between the Operators Negotiating Committee Appalachian Joint Conference and the Southern Appalachian Joint Wage Conference and the United Mine Workers of America to appear before the Board at ten AM Saturday April 24 1943, 5341 Department of Labor Build-

ing, Washington D. C. The purpose of this meeting with the board will be to get from the parties a summary statement of the issues in dispute and to discuss the procedure and timing to be followed in the presentation of the dispute to the board.

(Signed) William H. Davis, Chmn., NLWB.

[fol. 126] PLAINTIFF'S EXHIBIT No. 32

April 24, 1943.

No. 111-1284.
Washington, D. C.

The National War Labor Board by virtue of and pursuant to the powers vested in it by Executive Order No. 9017, January 12, 1942, hereby orders that the parties, in accordance with the request addressed by the President of the United States, to the parties under date of March 22nd, continue the uninterrupted production of coal under the contract terms and conditions that existed on and prior to March 31st, 1943, until the differences that now separate the parties are peacefully and finally resolved, with the understanding that if the new agreement includes any wage adjustments such adjustments shall be computed and applied retroactively from March 31st, 1943.

Signed by eleven members of the Board.

[fol. 127] PLAINTIFF'S EXHIBIT No. 33

W. L. B. Directs Collective Bargaining Resume—Parties to Report Results in Ten Days

The National War Labor Board at 7:00 P. M. tonight issued an interim directive order in Case No. 111-1284, the North and South wage dispute, directing that collective bargaining resume. That order follows in full quote.

J. D. Battle, Executive Secretary.

National War Labor Board

Case No. 11-1284

In the Matter of OPERATORS NEGOTIATING COMMITTEE, Appalachian Joint Conference and Operators Negotiating Committee, Southern Appalachian Joint Wage Conference and United Mine Workers of America

May 14, 1943.

Interim Directive Order

History of the Case

The parties to this labor dispute are the northern and southern groups of bituminous coal operators in the Appalachian area, and the United Mine Workers of America, representing some 336,000 miners. In March, 1943 negotiation for new contracts to replace those scheduled to expire on March 31, 1943, commenced in New York City. In each case, after the parties had outlined their positions for the record, negotiations were conducted in sub-committee without a record.

On March 22, the President of the United States, by telegram, requested that negotiations be extended, beyond March 31, 1943, the expiration date of the previous contract, until the dispute should be finally resolved, with the assurance that any wage adjustments included in the new agreement would be computed and applied retroactively from April 1, 1943.

On April 22, the Secretary of Labor certified the issues in dispute to the War Labor Board on the ground that direct negotiations as well as conciliation had failed, and the Board thereupon assumed jurisdiction in order to

"finally settle the dispute," as provided in paragraph (3) of Executive Order No. 9017, which reads as follows:

> "The procedures for adjusting and settling labor disputes which might interrupt work which contributes [fol. 128] to the effective prosecution of the war shall be as follows: (a) The parties shall first resort to direct negotiations or to the procedures provided in a collective bargaining agreement. (b) If not settled in this manner, the Commissioners of Conciliation of the Department of Labor shall certify the dispute. (c) If not promptly settled by conciliation; the Secretary of Labor shall certify the dispute to the Board, provided, however, that the Board in its discretion after consultation with the Secretary may take jurisdiction, the Board shall finally determine the dispute on its own motion. After it takes jurisdiction, the Board shall finally determine the dispute, and for this purpose may use mediation, voluntary arbitration, or arbitration under rules established by the Board."

On assuming jurisdiction, the Board promptly notified the parties by telegram that the old contract would remain — effect until the dispute was finally resolved, repeating the President's assurance as to retroactivity of any wage adjustments which might be included in the new agreement. The Board then sent a telegram requesting the parties to appear before it in order that the Board might get from the parties a summary statement of the issues in dispute, and to discuss the procedure and timing to be followed in the presentation of the dispute to the Board.

The United Mine Workers of America did not appear at this meeting.

Thereafter, the Board appointed a fact-finding Panel of representatives of the public, industry and labor, namely Mr. Morris Llewellyn Cooke, Mr. Walter White, and Mr. David B. Robertson. Mr. Robertson was ap[illegible]d as labor representative on the Panel after the Mine Workers had ignored the Board's invitation to nominate a representative.

On April 28, the Panel commenced its hearings in the Northern Bituminous case. The representatives of the United Mine Workers of America, though invited, did not attend this or any subsequent meeting of the Panel. On

the same day, the Panel, being advised that the miners were on strike, recessed the hearing until further notice, in accordance with the established policy of the Board to suspend all proceedings during a stoppage of work.

On May 1, 1943, the President ordered the Secretary of Interior to take possession of and operate the mines for the United States Government.

On Thursday, May 6, following advice that the work stoppage had terminated, the Panel resumed its hearing in the Northern Bituminous case, and, proceeding expeditiously, concluded them on the following day. On Monday, May 10, the Panel commenced its hearing in the Southern Bituminous case and concluded them in two days. At the hearings in both cases, the Panel followed the same procedure namely, to hear the arguments and evidence of the operators, and to introduce into the record the arguments and evidence of the United Mine Workers of America as presented in the transcript of the opening sessions of the Northern and Southern Appalachian Joint Wage Conference in New York at the opening of contract negotiations. This transcript was the only record available to [fol. 129] the Panel setting forth the demands of the miners and arguments and evidence in support thereof.

Obviously this method of presentation could scarcely do justice to the miners' case. The responsibility for this situation, however, rests solely on the representatives of the miners. Nevertheless, the Panel decided that it would make every effort to investigate the equities of the miners' case by the use of whatever reliable evidence it would procure. The daily transcript and exhibits were sent to the representatives of the miners. As a further effort toward fairness, the Board opened the hearings to the Public through the press. The door remained open at all times for intervention by the representatives of the miners. Thus the Panel made every effort to assure procedural due process of law for the absent party. The way is still open for the miners to present to or file with the Panel whatever arguments or evidence they may wish to present, subject, of course, to examination and comment by the operators.

During the week of May 11, the Board has conferred with the Panel as to its further procedure. The Board has now voted unanimously to instruct the Panel to continue with

its deliberations and report its ultimate findings of fact. At the same time, the Board has voted unanimously to issue the interim order hereinafter set forth.

Issues

The miners have presented twelve demands, one of which, headed "Other Provisions" is a merger of seven demands. During the course of negotiations, new demands were added, notably the demand for a "six day work week guarantee." Some of these demands, if granted, would add directly to the income of the miners, wholly aside from any change in straight-time hourly rates. Such demands include a six day work week guarantee, adjustment of hours, (the "portal to portal" demand) an increase in the vacation allowance, elimination of "occupational deductions", shifting of the cost of "safety equipment" from the miner to the operator, arrangements for "spotting" of cars, double time for Sunday, elimination of differentials between districts, and standard classifications. The granting of other demands would not add directly to the income of the miners. These demands refer to the contract termination date, organization of supervisory employees, procedure for district conferences and agreements, leasing of mines, union-made explosives, mine supplies and tools, the beginning of the work week, and "sympathetic strikes."

Conclusions

The bituminous coal cases were certified to the Board without agreement on a single issue. It is not the practice of the Board to look beyond the certification of a case before assuming jurisdiction, to ascertain whether the normal procedures of collective bargaining have been exhausted. However after taking jurisdiction, the Board or a panel of the Board has frequently ascertained that collective bargaining has not been exhausted, or that further bargaining would be fruitful. In such cases the Board has often directed the parties to resume negotiations and report the results to the Board.

[fol. 130] In this case the Board is impressed with the number of issues on which the parties should have been able to reach an agreement by the ordinary procedure of collective bargaining. The operators have indicated that the representatives of the miners were at fault in their seem-

ingly adamant stand on "Two dollars a day, no more, no less." But it is difficult to understand why the operators failed to advance any constructive bargaining suggestions on any of the numerous items in dispute.

On the other hand, it is difficult to understand the insistence of the representatives of the miners on basing their demands exclusively, at least for a time, on an abandonment by the Government of its "Little Steel" formula. Restriction of wage increases constitutes only one approach to the problem of controlling the cost-of-living. Price regulation and rationing are correlative approaches to this problem. A denial of increases in straight time rates does not constitute a denial of relief as to cost-of-living. If the miners have a justifiable complaint, it might be adjusted by stricter enforcement of price ceilings and the development of an adequate rationing program to meet the miners' special problems. Steps to accomplish those results have been taken and others are in progress.

This adamant position assumed by the parties seems to have precluded any attempt at real collective bargaining as to the numerous items on which collective bargaining could properly have taken place without violating the national wage stablization program.

As to the six day week it is noted that provision has been made to increase the price of coal to cover the cost of the overtime on the sixth day of operation. Since the mines have been taken over by the Government, under the direction of the Secretary of the Interior, provision has been made by special order for mandatory operation of the mines to the greatest feasible extent on a six day basis with payment of time and one-half or rate of one-half on the sixth day of work. With a scheduled demand for six hundred to six hundred and thirty million tons of coal for 1943, the largest in our history, plus a growing shortage of miners, it should be possible for the miners and the operators to undertake collective bargaining directed to the development of a mutually satisfactory plan by which the benefits of the six day week could be assured to the miners. Such a plan could probably be reinforced by assurances from the government to the operators that for an agreed period the operators will have a market for all the coal they can produce.

The Executive Orders of the President, notably 9017, and the Board's policies, permit and encourage collective

bargaining in war time as in peace time on all phases of the employer-employee relationship, which do not directly conflict with the national policies against inflation as defined in Executive Order 9250 and Executive Order 9328 as supplemented by the Director of Economic Stabilization on May 12, 1943. As applied to the facts in this case, there is more than ample room for collective bargaining, including bargaining on some issues which may reasonably produce a greater income for the mine workers without prejudicing the program which the government has adopted in time of war for the economic protection of the nation. [fol. 131] The procedure of collective bargaining in time of war serves the purpose of resolving the issues in dispute, or narrowing the issues; to facilitate a fair and speedy determination by the War Labor Board. In this case, because of the apparent absence of any real collective bargaining on many of the major issues these values of collective bargaining are wholly absent. The Board through its Panel is nevertheless proceeding to assemble the facts on which it will base its final decision. Meanwhile, as a constructive step in expediting final settlement of this dispute, either by agreement or by Board decision, the Board is directing the parties to resume negotiations with a view to eliminating, or at least narrowing, some or all of their differences.

Interim Directive Order

By virtue of and pursuant to the powers vested in it by Executive Order No. 9017 and Executive Order No. 9250, the National War Labor Board hereby directs that:

1. The parties shall resume collective bargaining under arrangements to be worked out by the parties jointly in consultation with a Division of the Board on Monday morning, May 17, 1943, at 10:00 a. m.

2. The parties shall report to the Board within ten (10) days the results of their further negotiations.

3. Any wage adjustments resulting from such negotiations shall be submitted to the Board for its approval.

4. The parties shall continue the uninterrupted production of coal under the contract terms and conditions that existed on and prior to March 31, 1943 until the differences that now separate the parties are peacefully and finally

resolved, with the understanding that if the new agreement includes any wage adjustments such adjustments *such adjustments* shall be computed and applied retroactively from March 31, 1943.

5. The Panel shall proceed to complete its findings of fact and submit its report to the Board at the earliest moment consistent with a fair and complete analysis of the evidence in the case.

[fol. 132] PLAINTIFF'S EXHIBIT No. 34

Western Union Telegram

Washington D C 1943 May 17 P. M. 5 21

John L. Lewis, President United Mine Workers of America
Roosevelt Hotel

Since I have been charged with the Responsibilty of Operating the coal mines of the country, and having further in mind that since taking over the mines the employees are now working for the government, I would appreciate your giving me assurance that members of the UMWA will continue to work without interruption at midnight tomorrow, May 18. I express the hope that by this action the way will be opened for immediate collective bargaining conferences

(S.) Harold L. Ickes, Secretary of the Interior.

[fol. 133] PLAINTIFF'S EXHIBIT No. 34-a

Western Union

New York City, May 17, 1943.

Honorable Harold L. Ickes, Solid Fuels Coordinator for War and Custodian of the Mines, Bituminous and Anthracite, Department of the Interior, Washington, D. C.

The United Mine Workers of America Tri-District Scale Committee and the Bituminous Appalachian Scale Committee are in receipt of your request to continue the mines in operation without interruption at midnight, May 18, in the hope that by this action the way will be open for im-

mediate collective bargaining conferences. We are impressed with the fact that your telegram reflects the public interest and that you hope to be able to institute immediately the collective bargaining conferences which we have long been awaiting. We are directing immediate compliance with your request and are dispatching telegrams at once to all local unions in the anthracite and bituminous coal fields of the nation. We are requesting our membership to continue at work under the existing retroactive extension agreement until midnight, May 31. May we point out this is the third time that the United Mine Workers of America has accepted an extension of the agreement, in lieu of a new wage contract which the mine workers of the nation hoped would be forthcoming. May we not hope that in consideration of this continuous exemplification of the patriotism of the members of the United Mine Workers of America that our government will now, without further delay, instruct the coal operators of the industry to forthwith engage in collective bargaining conferences, so as to insure the making of an agreement in the period again allotted for that purpose.

(Signed) John L. Lewis, John O'Leary, Thomas Kennedy.

[fol. 134] PLAINTIFF'S EXHIBIT No. 35

National War Labor Board

Case No. 111-1284

Washington, D. C., May 25, 1943.

In the Matter of Operators Negotiating Committee, Appalachian Joint Conference and Operators Negotiating Committee, Southern Appalachian Joint Wage Conference and United Mine Workers of America.

Comments and Directive Order

On May 14, 1943, the National War Labor Board issued in this case an Interim Directive Order accompanied by a brief review of the history of the dispute. We summarized at that time the events leading up to the Order of the President on May 1, 1943, directing the Secretary of the Interior to take possession of and operate the mines for the United

States Government; the subsequent resumption of production of coal; the renewal on Thursday, May 6 of the hearings before the Panel appointed by the Board, and the failure of the mine workers to appear at those hearings.

We pointed out that the Panel, notwithstanding the failure of the representatives of the mine workers to appear, decided to investigate the equities of the mine workers' case by the use of whatever reliable evidence it could procure, at the same time making every effort to assure procedural due process of law to the absent parties. The Panel hearings were opened to the public, daily transcripts and exhibits were sent to representatives of the mine workers, and the latter were invited to present or to file with the Panel whatever arguments or evidence they might wish, subject, of course, to examination and comment by the operators.

We further pointed out that between May 12 and May 14, the Panel continued its study of the case and was in conference with the full Board, and that the Board had become convinced that the adamant position assumed by the parties in the negotiations had precluded any real collective bargaining on the numerous items as to which collective bargaining could have properly taken place without violating the national wage stabilization program.

[fol. 135] Acting upon this conviction, and in accordance with its established policy of ascertaining, in any case before it, whether the normal procedures of collective bargaining and had been exhausted and of referring the issues or in whole or in part back to the parties for further bargaining, if that course seemed to contain any promise of settling the dispute or narrowing the issues, the Board on May 14, 1943 issued the following Interim Directive Order:

"By virtue of and pursuant to the powers vested in it by Executive Order No. 9017 and Executive Order No. 9250, the National War Labor Board hereby directs that:

"1. The parties shall resume collective bargaining under arrangements to be worked out by the parties jointly in consultation with a Division of the Board on Monday morning, May 17, 1943, at 10:00 a. m.

"2. The parties shall report to the Board within ten (10) days the results of their further negotiations.

"3. Any wage adjustments resulting from such negotiations shall be submitted to the Board for its approval.

"4. The parties shall continue the uninterrupted production of coal under the contract terms and conditions that existed on and prior to March 31, 1943 until the differences that now separate the parties are peacefully and finally resolved, with the understanding that if the new agreement includes any wage adjustments such adjustments shall be computed and applied retroactively from March 31, 1943.

"5. The Panel shall proceed to complete its findings of fact and submit its report to the Board at the earliest moment consistent with a fair and complete analysis of the evidence in the case."

The representatives of the mine workers declined to take advantage of this opportunity to resume collective bargaining under the auspices of the Board, and failed to appear for consultation with a Division of the Board as instructed.

Thereupon, in accordance with paragraph 5 of the Interim Directive Order, the Panel proceeded to complete its findings of fact and submitted its report to the Board on Friday, May 20, 1943. Copies of the Panel's report were forwarded to the parties and were given to the press. The Panel report with the attached exhibits has been carefully examined by the full Board, which now issues this Directive Order in accordance with the provisions of Executive Order No. 9017 of January 12, 1942.

[fol. 136] Notwithstanding the impediments that have been put in the path of the National War Labor Board in the discharge of its duties in this case, the Board has, as in any other case, tried to evaluate soundly and impartially the right and interests of the wage earners in the light of the national wage stabilization policy declared in the Act of October 2, 1942 and Executive Order 9250 of October 3, 1942 and in Executive Order No. 9328 as modified by the Policy Directive of the Director of Economic Stabilization on May 12, 1943.

Issues

In the resume accompanying our Interim Directive Order of May 14, 1943, we stated the issues as follows:

> "The miners have presented twelve demands, one of which, headed 'Other Provisions' is a merger of seven demands. During the course of negotiations, new de-

mands were added, notably the demand for a 'six day work week guarantee.' Some of these demands, if granted, would add directly to the income of the miners wholly aside from any change in straight-time hourly rates. Such demands include a six day work week guarantee, adjustment of hours, (the 'portal to portal' demand) an increase in the vacation allowance, elimination of 'occupational deductions', shifting of the cost of 'safety equipment' from the miner to the operator, arrangements for 'spotting' of cars, double time for Sunday, elimination of differentials between districts, and standard classifications. The granting of other demands would not add directly to the income of the miners. Those demands refer to the contract termination date, organization of supervising employees, procedure for district conferences and agreements, leasing of mines, union-made explosive, mine supplies and tools, the beginning of the work week, and 'sympathetic strikes.' ''

More Specifically the issues were submitted to the Northern Appalachian Operators in the Appalachian Joint Conference on March 10, 1943; and to the Southern Appalachian Joint Wage Conference on March 13, 1943, in the following form:

''Appalachian Joint Conference Proposals''

''1. Contract Termination.

That the Appalachian Joint Wage Agreement be extended from April 1, 1943 to March 31, 1944, inclusive, with the following modification and changes, viz., during the contract period, either party, through representatives designated by the Operators or the International Union, United Mine Workers of America, may terminate the Joint Wage Agreement by giving thirty (30) days' notice in writing, in advance of such cancellation.

[fol. 137] ''2. Hours of Labor.

That the Maximum hours and working time provisions of the Joint Wage Agreement, including the supplemental agreements regarding the six-day week, be reaffirmed with the following modifications:

(a) The six-day week to terminate when the war emergency ends.

(b) To conform with the basic and legal requirement for the industry, the maximum hours and working time provisions be amended to establish portal to portal for starting and quitting time for all underground workers.

"3. Wage Rate Increases.

Combined cutting and loading rates shall be increased 28¼ cents per ton; 25¼ cents of this amount shall be added to the existing rates for loaders and 3 cents to existing cutting rates.

Rates for all classifications of inside and outside day men shall be increased $2.00 per day, except those classifications with substandard wages; namely, greasers, trappers, flaggers, switch throwers and slate pickers, who shall be increased an additional 85 cents per day.

Monthly men shall receive a directly proportionate increase.

The minimum day rate shall be $8.00 without exception.

The increased rates include compensation to meet the portal to portal starting and quitting time.

Pick mining rates shall be increased 28¼ cents per ton.

Yardage and deadwork rates shall be increased 28.57 per cent.

Cutting rates on track mounted machines shall be increased 3 cents per ton. Where tonnage rates are paid on conveyors or other mechanical loading devices, the increase shall be 25¼ cents per ton. Footage and yardage rates shall be increased 28.57 per cent.

"4. Standard Classifications.

Standard classifications of men employed on the various mechanized units shall be established in order to eliminate varying sizes of crews. Such classification shall be uniform both as to day and tonnage workers.

"5. Monthly Men in Strip Mining.

The day and monthly men employed at strip mining operations will have the same wage increases applied and governed by the basic $2.00 per day increases.

[fol. 138] "6. Double Time for Sunday.

Double time shall be paid for all work performed on Sunday.

"7. Vacation Payment.

The Compensation payments for the vacation period shall be increased to fifty dollars ($50.00).

"8. Exemptions Under This Contract.

The term 'mine worker', as used in this Agreement shall include all persons inside or outside of the mine, except the superintendent.

"9. Differentials.

Existing inequitable differentials within and between Districts shall be eleminated, including cutting and loading rates and all other factors operating to maintain such differentials and inequalities.

"10. Shifts.

The operation of three shifts within twenty-four hours and concentrated methods of mining, that prevent rock dusting, necessary ventilation to dilute inflammable and noxious gases, and proper inspection, have increased the hazards and resulted in great loss of life. In order to promote safety and establish sound mining practices we, therefore, demand modification of the provision in the Appalachian Joint Wage Agreement dealing with shifts by limiting the number of shifts so that not more than two can be operated within any twenty-four hours.

"11. Other Provisions.

Operators who are parties to this Agreement shall include clauses to protect the wage scales and conditions of employment whenever any of their mines are let to any corporation, company or individual for operating purposes. This obligation is to protect the contract and preserve the interest of the miners.

The operators shall be responsible for delivering mine bars to and from the miners' working places.

Only union-made explosives, mine supplies and tools shall be made available for use by the mine workers.

Mine workers shall not be required to pay for safety equipment and devices, including electric light and cap rentals. All day and monthly men shall be furnished necessary tools and equipment without charge.

There shall be no charge to the miners for blacksmithing.

The work week shall begin on Monday and shall be designated in the Agreement.

[fol. 139] It will not be a violation of any terms of the Agreement for the mine workers to cease work to prevent shipment of coal to non-union concerns or where a strike is in progress.

"12. District Conferences and Agreements.

Joint conferences of districts in the Appalachian Region shall be held concurrently with the Appalachian Conference. All other districts shall meet in joint conferences after the Appalachian Agreement is negotiated for the purpose of negotiating district wage agreements pursuant to the basic agreement and this policy.

Wage scale resolutions, affecting local working conditions and rules, shall be made a subject for consideration by all district joint conferences.

Districts shall not negotiate agreements which grant more favorable conditions to the Operators than obtain the basic contract.

All supplemental agreements shall be approved by the International Union."

Economic Position of the Industry, 1923 to 1942 Inclusive

The history of the bituminous coal industry is one of overdevelopment and irregular operation. Even before 1923, despite a generally rising rate of production of bituminous coal, the industry was characterized by wide fluctuations in annual output and excess capacity. After 1923 a period of drastic curtailment set in and, because bituminous coal is largely an industrial fuel, the business depression accelerated the downward tread. By 1932, production was 45.1 percent below the 1923 level, total realization 73.1 percent, and number of wage earners 42.3 percent. Those dependent on the industry for a livelihood also suffered a drastic curtailment in their incomes. The wage earners who on an average earned $.845 an hour in 1923 received only $.681 in 1929 and $.52 in 1932. Average weekly earnings, which were $25.60 in 1923 and $25.71 in 1929, dropped to $13.91 in 1932. Average annual earnings fluctuated between $1150 and $1396 during the years 1923 and 1929, and then dropped sharply to $677 in 1932. Not income prior to de-

ductions for income and excess profits taxes, which were substantial during the war and post-war years, disappeared by 1925.

The plight of the industry improved as the forces of recovery became effective in 1933 and subsequent years, but the industry as a whole continued to report deficits through the year 1939. The year 1940 showed for the industry as a whole net profits for the first time in fourteen years. In the years 1941 and 1942 the all-out effort to win the war further enhanced the demand for bituminous coal.

[fol. 140] In 1942 the bituminous coal mines produced 580,000,000 tons—an output which surpassed the previous all-time high of 579,000,000 tons in 1918. In 1941 per ton realization exceeded reported costs by about 7 cents; in the 12 months ending June 30, 1942, by 9 cents.*

In the years since 1933 the United Mine Workers of America now effectively organized throughout the industry, have secured wage increases which greatly increase the deeply depressed income of the mine workers. These increases in wage rates coupled with the increased production in the year 1942, in which average working days are estimated at 240, have lifted the earnings of the mine workers for 1942 to an average hourly earning of $1.06, an average weekly earning of $35.00 and an average annual earning of approximately $1,736. It is to be remembered, of course, that these average figures, although they are valid and useful for comparative purposes, do not measure the actual income of individual mine workers. They do show that on the average the year 1942 was a year of comparative prosperity both for the mine operators and the mine workers. With the existing demand for bituminous coal, it is reasonable to presume that the year 1943, in which it is estimated that there will be a production of 600,000,000 tons, will be even more satisfactory to all those whose livelihood depends upon the bituminous coal industry. With the 6-day week, which has now been arranged for, there will un-

* The per ton margin should not be regarded as net returns to the owners of the mines because the cost data do not include interest or investments, taxes on unassigned coal lands or coal lands which will not be mined for 30 years, cost of mines under development, expenses for company houses, demurrage charges, idle mines, abandoned mines, and bad debts.

doubtedly be a substantial increase in the weekly and annual income of the mine workers in 1943, and no doubt an increase in the net realization of the operators.

A Comparison of Hours and Earnings in Bituminous Coal with Hours and Earnings in Other Industries or Groups of Industries**

A comparison of weekly hours, and average hourly and weekly earnings of bituminous coal mines with those prevailing in 9 competing and selected higher paid basic industries, in manufacturing industries as a whole, and in metalliferous mines in December of 1942 is summarized below.***

[fol. 141] Hours Per Week. In all these industries, except anthracite and bituminous-coal mining, hours of work averaged 40 or more per week. Bituminous coal mines averaged 35.7 in December, 1942, while establishments in manufacturing industries as a whole averaged 44.4 and those in metalliferous mining 43.9. The durable-goods group of manufacturing industries averaged 46, shipbuilding and class 1 steam railroads 48, and locomotives 50.

Average Hourly Earnings Excluding Overtime (Straight-time Hourly Earnings). The $1.061 earned per hour by bituminous mine workers was $.211 higher than the hourly earnings paid in manufacturing industries as a whole and $.182 above those paid in metalliferous mining. In only four of the industries included in this analysis—did wage earners receive higher straight-time hourly earnings than did the—

** Because the employees who are in the mines spend some time each day going to and from their working places to the entrance of the mine, the average hours and hourly earnings reported for bitu*nimo*us coal mines are not strictly comparable with those reported for most manufacturing industries.

*** Competing Industries:

Anthracite, Crude-Petroleum production, electric light and power.

Selected High-Paid Industries:

Shipbuilding, Locomotives, Automobiles, Petroleum refining, Blast furnaces, steel works and rolling mills, Class 1 steam railroads.

bituminous coal workers. In no instance did the miners by more than $.07 per hour.

Average Weekly Earnings. The mine workers earned, however, less per week, in some instances substantially less, than wage earners in these competing and selected high-paid industries except those employed in anthracite mines. This poorer comparative showing of average weekly earnings was due to the fact that the mine workers worked only 35.7 hours per week while wage earners in other industries averaged 40, 44, 48, and even 50 hours per week.

Under the new six-day week arrangement, mine workers who work the full 6-day week of 42 hours with pay at the rate of time and one-half for 7 hours, as provided in the existing Appalachian agreement, will earn average weekly incomes not exceeded by the average weekly incomes of wage earners in any of these selected industries except shipbuilding, locomotives and automobiles.

Average Annual Earnings. The average annual earnings of bituminous coal miners for 1942 (computed from the employment and payroll data compiled by the Bureau of Labor Statistics) when compared with these competing and selected high-paid industries and for the other industries and basic industrial groups make a less favorable showing than the weekly earnings comparison.* They are below, frequently considerably below, annual earnings for the selected high-paid industries and for the durable-goods group of manufacturing industries, metalliferous mining, wholesale trade, and 12 other individual industries. This less favorable showing made by the bituminous coal industry is accounted for in part, by the fact that the mine workers averaged only 32.9 hours per week and in part by failure to work continuously throughout the year. The industries with much higher annual earnings worked from 45 to 48 more hours, and paid their workers substantial overtime. [fol. 142] Here again the position of the bituminous coal miners will be substantially improved by the arrangements

* It may be noted, however, that the average annual earnings of mine workers are $328 above those computed for the nondurable-goods group of manufacturing industries, and considerably higher than those for cotton seed oil, cake and meal, cotton goods, men's clothing, sawmills, women's clothing, boots and shoes, millwork, retail trade, and printing and publishing.

for operating the mines on a 6-day week. If one day of work at time and one-half is added to the 1942 weekly income of a mine worker his average annual income in 1943 will be exceeded, among all the industries, only by the average annual income of workers in shipbuilding, locomotives, machine tools, automobiles, aircraft and electric and steam railroad cars. It would equal or exceed the income of the workers in all these other basic industries or industrial groups.

Wage Rate Changes Since January 1, 1941

During the period January 1, 1941 to March 19, 1943, the mine workers received but one general wage increase and that became effective in April 1941. The percentage increases that were granted to important occupational groups and to all mine workers (obtained by weighting the percentage increases computed for each occupation or occupational group from the rates specified in the contracts in effect before and after the wage negotiations) are shown below:

Occupational Group	Percentage Increase
All Mine Workers	18.2
Outside Day Men	24.5
Inside Day Men	21.1
Tonnage Men	15.5

In its decision in the "Little Steel" cases (In re: *Bethlehem Steel Corporation, Republic Steel Corporation, Youngstown Sheet and Tube Company, Inland Steel Company and United Steel Workers of America, C. I. O., 31, 34, and 35*) on July 16, 1942 this Board, seeking to do its part in the stabilization of "the purchasing power of the wage earners hourly wage rates as of January 1941" and at the same time "to avoid that kind of injustice that comes from rigidly applying a horizontal rule to all cases without regard to their particular merits," adopted a yardstick for measuring the propriety of a general wage increase within the national stabilization program. The Board in that case recognized "its duty to indicate the manner in which the national economic policy affects the demands of labor for general wage increases." The Board found that, following a period of relative stability in the relation of

wages to prices, there had been an increase in the cost-of-living as measured by the general index of the Bureau of Labor Statistics, of 15% from January 1, 1941 to May 15, 1942, the approximate date of the President's stabilization message of April 27, 1942. To effect the desired stabilization with due regard to this increase in the cost-of living, the Board laid down the rule that "if any group of workers averaged a 15% wage increase or more" for the period from January 1, 1941 to May 1942 "their established peace-[fol. 143] time standards have been preserved". And the board announced that for any such group of workers no further general wage increase would be made as a cost-of-living allowance; that wage adjustments for such a group could only be considered from the point of view of inequitable or substandard conditions, such as had been outlined in the President's message of April 27, 1942.

That yardstick has been applied by the Board from that time to this, to great masses of American workers which in the aggr-ate include the great majority of all such workers. It would be manifestly unfair to apply any other yardstick to the mine workers. The War Labor Board exists and acts by exercise and delegation of the war powers of the President as Commander-in-Chief. In its exercise of those powers it must certainly apply them equally to all men in similar circumstances. That is the very essence of justice.

For these reasons the mine workers' demand for a general wage increase of $2.00 a day must be denied, since they are among those workers who have already had a general wage increase of more than 15% since January 1, 1941.

Accordingly, by virtue of and pursuant to the powers vested in it by Executive Order No. 9017 of January 12, 1942, the Act of Congress of October 2, 1942 and the Executive Orders and Regulations issued thereunder, the National War Labor Board hereby directs as follows:

1. Wage Rates

a. General Wage Rates

The demand for a general wage increase of two dollars a day is denied.

b. Reclassification

The parties shall negotiate forthwith a reasonable reclassification (1) of the occupations of greasers, trappers, flaggers, switch throwers and slate pickers, or (2) of the employees engaged in those occupations. Any agreement resulting from such negotiations which provides for reclassification of these occupations shall be submitted to the Board for its approval.

2. Portal to Portal

Wage adjustments made in compliance with the Fair Labor Standards Act of 1930 are consistent with the national wage stabilization policy. The demand of the mine workers for portal to portal pay rests on the assumption that such pay is required by the Fair Labor Standards Act, and that the Operators do not now make such payment.

In support of its claim the Union refers to a recent decision of the U. S. Circuit Court of Appeals for the Fifth Circuit in the case of *Tennessee Coal, Iron and Railroad Company* v. *Muscoda, Local No. 123.*

[fol. 144] That decision upheld the finding of the lower court that all time spent underground in the iron ore mine involved was working time and should be included in the computation of the employees' work week under Section 7 of the Fair Labor Standards Act, which requires every employer to pay overtime wages for a work week longer than forty hours.

The operators, on the other hand, allege that the court decision in that case is an erroneous one, even on the facts of the case, and further, is not applicable to the coal mines involved in the instant dispute because of vital differences between the facts in the *Tennessee Coal, Iron and Railroad Case* and those of the instant case. In addition, the coal operators allege that the time consumed in travel from portal to portal was taken into account when the parties, in collective bargaining, negotiated the wage rates of the present Appalachian contract. Therefore, the operators claim, any legal obligation which may exist for the payment of travel time from portal to portal is being met by them now in the form of existing base rates of pay, which were agreed to by the parties at a higher level than would have been the case if the nature of the industry did not require portal to portal travel time.

It is not within the province of the National War Labor Board to determine whether or not in this case the law requires payment for all time spent underground. It should be pointed out, however, that the decision of the Circuit Court of Appeals in the *Tennessee, Coal, Iron and Railroad Case* is subject to rehearing by the same court and is also subject to review by the U. S. Supreme Court on writ of certiorari.

Thus, this controversy over portal to portal pay presents a mixed question of law and fact which, in the absence of a specific court determination binding on these parties, can and should be settled by them in collective bargaining.

It should be recognized by the parties that any agreement reached by them in collective bargaining on this matter must be genuinely and reasonably related to the portal to portal issue. Any such settlement shall be submitted to the War Labor Board with supporting data sufficient to enable the Board to determine whether or not it constitutes a genuine settlement of alleged claims arising under the Fair Labor Standards Act, and not an indirect wage increase in violation of the wage stabilization policies.

The Board understands that there is considerable variation in portal to portal travel time among the different coal areas in the country. Although the Appalachian area only is before us, it is the practice of outlying areas to a large extent to follow the Appalachian agreement. If the parties in their negotiations choose to negotiate on the basis of area adjustments, then the Board would be able to approve wage adjustments based on travel time in any area on a basis shown to be justified by the facts of that particular area.

Furthermore, the Board feels that any payment for travel time should be so designated and paid for as an item sepa- [fol. 145] rate and apart from hourly or tonnage wage rates, in order that there may be no doubt that travel time has been included in the mine workers' compensation.

It should be understood that if the parties decide to settle their differences over the portal to portal issue and share the benefits among all the miners including those who work on the surface as well as underground, the total sum distributed shall not be in excess of a sum computed on the basis of the average time spent by underground workers in travel from portal to portal.

With these understandings, the Board directs the parties to undertake to reach such a settlement, subject to Board approval.

3. Double-Time for Sunday

The demand for payment of double-time for all work performed on Sunday as such is governed by Executive Order No. 9240. The demand is therefore denied.

4. Vacation Payment

In the paragraph of the present Agreement entitled "Vacation with Pay," the words "'the sum of twenty dollars ($20.00)'" shall be replaced by the words "the sum of fifty Dollars ($50.00)."

5. Leased Mines

The parties shall negotiate forthwith a suitable provision to protect the wage scales and conditions of employment existing whenever a mine under contract is let for operating purposes, provided that, unless otherwise mutually agreed, such provision shall not impose an obligation on the lessor to guarantee the wage scales and conditions of employment.

6. Union Made Explosives

The demand that only union made explosives, mine supplies and tools shall be made available for use by the mine workers is denied.

7. Deductions from Wages for Occupational Charges

It is the opinion of the National War Labor Board that the mine workers' request that they should not be required to pay for safety equipment and devices, including electric light and cap rentals, is a fair and reasonable one. It is the opinion of the Board that the operators should furnish to the mine workers without charge, their safety equipment and working tools, including blacksmithing.

Therefore, the Board directs the parties to settle the issue of deductions from wages for occupational charges by incorporating in their new contract the principle that such charges shall henceforth be paid for by the operators. These charges to be shifted to the operators shall not include per-

sonal wearing apparel such as hats, clothing, shoes and goggles.

[fol. 146] It is the ruling of the Board that the operators should stand the cost of all occupational charges for tools and equipment necessary for the mining of coal, and that the mine workers should pay for special personal clothing equipment necessary for work in the mines. The foregoing general principle is well recognized in American industry. It is the opinion of the Board that the time has come for its general application in the coal industry as well.

Those charges now to be shifted to the operators, the amount of which can be immediately determined from the books of the operators, shall be retroactive. Those charges, the amount of which cannot be immediately determined, shall become effective on the date of the Directive Order.

8. Spotting of Cars

The Board is of the opinion that the operators should be responsible for delivering mine cars to and from the working faces in all mines, in accordance with now prevailing practice among the more efficient mines. It is recommended that the parties negotiate on this issue and report the results of their negotiations to the Board.

9. Contract Termination

Unless otherwise mutually agreed, the term of the contract shall be two years beginning April 1, 1943, except as to general wage rates, which may, on thirty days' notice from either party be reopened for negotiation at the end of the first contract year. The foregoing sentence shall not preclude the parties from mutually agreeing, at any time during the term of the contract, on changes in general wage rates, subject to approval by the Board. If at any time during the term of the contract a significant change occurs in governmental wage policy, either party shall have the right to request negotiations on general wage rates. If the parties are in disagreement as to whether a significant change has occurred, such dispute may be submitted to the Board for decision.

10. Other Issues

On all other issues not covered by this Directive Order, the provisions of the present Appalachian Agreement and

the various District Agreements, unless changed by mutual consent, shall be continued.

11. The Six-Day Week

Operation of the bituminous coal mines of the country on a six-day week has, at the request of the Solid Fuels Administrator, been planned for by the industry. The parties to the Appalachian agreement on February 10, 1943 modified that Agreement to provide for a sixth day of work of seven hours, for which the mine workers are paid at the rate of time and one-half. The War Labor Board on December 3, 1942 notified the Office of Price Administration that such overtime payment was called for by the letter and spirit of the Appalachian Agreement and could be put into effective- [fol. 147] ness without further approval of the Board. Since January, 1943 the OPA has authorized an increase in the maximum price of bituminous coal, district by district, to include the cost of this overtime payment. The new maximum prices have been extended to all areas in which the operators have been directed to operate the mines on a six-day basis. This includes all the bituminous coal mining areas of the country except Northern Colorado and Iowa, where the conditions are such that a sixth day of operation is not feasible. To these regions the increase of maximum prices has not been applied.

These steps, in conjunction with the war time demand for maximum output of bituminous coal and the growing shortage of mine workers, afford a very considerable assurance that the six-day week will generally prevail in all areas except Northern Colorado and Iowa. Complaint has, however, been made that in individual cases mine workers have not been given a fair and equal opportunity of actual employment six days a week even though the individual workers have been ready and able to work six days.

The National War Labor Board recommends that the parties mutually agree on a reasonable contract provision, wherever the mines are operating six days a week, whereby the operators will give a fair and equal opportunity to individuals to work during each of the six days. The Board suggests that such a contract provision might well include a stipulation that the operator will not hire additional workers until his present employees have had such full opportunity.

If such a contract provision is agreed upon, it should be adjusted to the grievance provisions of the Appalachian Agreement. If the parties cannot agree to such a provision, the Board will take the matter under further consideration for the purpose of working out an appropriate contract provision to be included in a supplemental Directive Order of the Board.

The Board is receptive to any reasonable proposal to assure all miners the benefit of the sixth day of operation. However, an annual wage based on 52 weeks of production at six days a week cannot be guaranteed the mine workers without imposing an undue burden on the industry or greatly increasing the cost of coal to the public.

Nevertheless, it may be possible to assure the mine workers a greater benefit than they now enjoy from the six-day week without undue hardship on the operators. These problems, which lie outside of the field of labor disputes and wages, appear to be suitable for consideration by a body of appointed experts, organized as a commission, working in collaboration with the Administrator of Solid Fuels for War.

This commission would be in a position to study such other problems as the parties, or the Board, might wish to refer to it. The commission would consider, on the one hand, possible improvements in working conditions, matters of safety and improvements in living conditions for the [fol. 148] miners and their families, and on the other hand, improved efficiency in mining operations, as well as in the transportation and marketing of coal.

The Board recommends to the parties the creation of such a commission.

12. Final Disposition of Issues Referred to Collective Bargaining

On or before fifteen (15) days from the date of this Directive Order, the parties shall submit for Board approval any agreement reached relating to wages. The parties shall also report within fifteen (15) days, for final dispositions by the Board, any issues still in dispute on which an agreement has not been reached. Until the differences that now separate the parties are peacefully and finally resolved in accordance with the procedure set forth in this Directive Order, the parties shall continue the uninterrupted produc-

tion of coal under the contract terms and conditions that existed on and prior to March 31, 1943 with the understanding that any wage adjustments included in the new agreement shall be computed and applied retroactively from March 31, 1943.

(S.) William H. Davis, Chairman, Frank P. Graham, Robert J. Watt, Martin P. Durkin, Roger D. Lapham, George H. Mead, George W. Taylor, Wayne L. Morse, Van A. Bittner, John Brophy, Cyrus S. Ching, Horace B. Horton.

The labor members dissent on the decision to deny the mine workers' request for a $2.00 a day general wage increase for the following reasons:

The Minority Opinion

The Labor Members dissent from the decision of the majority which refuses to grant the United Mine Workers' request for a two dollar per day raise in straight time hourly pay. The Labor Members submit that this request of the miners is justified because of the tremendous and uncontrolled rise in the cost of living during the past two years.

We are forced to register our objections to the application of the 15% allowance for the increased cost of living not only in this specific case but also in general.

[fol. 149] Weakness, vacillation and indecision are the prominent characteristics which have marked recent attempts to regulate prices. At the same time the regulation of wages has been followed so rigorously that workers have been allowed relatively small and numerically few wage increases. The uncontroverted report of the War Labor Board to Congress is substantial evidence of the fact that the workers of this nation have done more than "hold the line." Wages have occupied the anchor position in the tug-of-war between the forces of inflation and of anti-inflation. The failure of price regulation makes imperative that wage regulation must be realistically adjusted.

(S.) George Meany, Van A. Bittner, Matthew Woll, Delmond Garst, Robert J. Watt, John J. Brophy, Martin Durkin.

[fol. 150] PLAINTIFF'S EXHIBIT No. 36

June 1, 1943.

John L. Lewis (Identical telegram to Ezra Van Horn), Pan American Room, Statler Hotel, Washington, D. C.

Reports received today show that many coal mines are not operating because of failure of members of the United Mine Workers to report for duty. These workers are employed under a contract which has been continued in effect by direction of the President of the United States, and I have carried out, and will continue to carry out, its provisions. The failure of the union members to work constitutes a strike against the government of the United States, which is in possession of the mines. On the other hand, there are a few powerful operators who from the beginning have deliberately opposed any compromises which might lead to a reasonable settlement. The failure of the operators and the representatives of the miners to reach a mutually agreeable contract, subject to the jurisdiction of the War Labor Board, during many weeks of dilatory proceedings, is an important factor in the creation of the present situation. Without coal in adequate quantites we cannot win the war. It is intolerable that there should be a cessation of work for so much as one day regardless of where the blame lies for failure to conclude a contract between the operators and the miners, neither group can escape responsibility for the delay which necessitated intervention by agencies of Government, and the President of the United Mine Workers cannot escape responsibility for the cessation of work today. I call upon the President of the United Mine Workers to return to their wartime posts of duty. I also call upon the members of both groups, each to do within his individual capacity, everything necessary to reach a speedy conclusion that will assure a continuous production of coal on a normal basis.

(Signed) Harold L. Ickes, Secretary of the Interior.

[fol. 151] PLAINTIFF'S EXHIBIT No. 37

June 3, 1943.

Statement by the President

Most of the Nation's coal mines are closed because of a general strike which has taken place in defiance of the Government of the United States. I have instructed the Secretary of the Interior, who has possession of the mines for the Government, to proceed to reopen the mines.

The Secretary of the Interior will continue to operate the mines under the terms and conditions of work which obtained under the old contract which was extended by order of the War Labor Board plus those new terms and conditions which have been approved by the Board and which were announced in the Board's order of May twenty-fifth.

As President and Commander-in-Chief, I order and direct the miners who are not now at work in the mines to return to their work on Monday, June 7, 1943. I must remind the miners that they are working for the Government on essential war work and it is their duty no less than that of their sons and brothers in the armed forces to fulfill their war duties.

Just as soon as the miners return to work, the disposition of the dispute between the miners and the operators will forthwith proceed, under the jurisdiction of the War Labor Board and in accordance with the customary and established procedures governing all cases of this sort.

[fol. 152] PLAINTIFF'S EXHIBIT No. 38

National War Labor Board

Washington, D. C.,

June 17, 1943.

Case No. 111-1284

In the Matter of OPERATORS NEGOTIATING COMMITTEE, APPALACHIAN JOINT CONFERENCE, and Operators Negotiating Committee, Southern Appalachian Joint Wage Conference, and United Mine Workers of America

OPINION

The Operators Negotiating Committee of the Appalachian Joint Conference and the Operators Negotiating

Committee of the Southern Appalachian Joint Wage Conference have reported to the Board that no agreement has been reached with the United Mine Workers of America on any of the issues which the National War Labor Board, in its directive order of May 25th, referred back to the parties for further negotiation.

The principal question so referred was whether the parties could agree upon a reasonable settlement of the claim advanced by the United Mine Workers that the underground workers are lawfully entitled to additional compensation for travel time, under the provisions of the Fair Labor Standards Act.

Since the parties have failed to agree it becomes our duty, under the national no-strike policy and Executive Order #9017 of January 12, 1942, finally to determine this labor dispute.

We have directed the parties to execute new contracts containing all the basic provisions of the old Appalachian agreements, with certain modifications which are specified in the Directive Order. These include a provision for an additional $30.00 of vacation pay as provided for in our directive order of May 25th, and provisions requiring the operators to pay for safety equipment and devices, including electric light and cap rentals, and for blacksmithing and to furnish necessary tools and equipment without charge. The Order does not provide for the payment of any additional compensation for travel time for "portal to portal" pay.

[fol. 153] Portal to Portal Issue:

The Board, in its discussions of this case, has considered the matter of additional compensation for travel time in two aspects, (1) the inequality that comes from basing the pay of all underground workers on the hours worked at their working places in the mines, when the individual workers spend different amounts of time getting from the portal of the mine to their working places and back from the working places to the portal, and (2) the legal claim advanced by the United Mine Workers for additional pay for travel time under the Fair Labor Standards Act.

(1) The inequality that results from basing the pay of all the miners on the same hours worked at their working places, regardless of the amount of time that the individual

worker has to spend in traveling, is an inequality that could be cured only by including in the pay of individual mine workers an additional compensation *according to the amount of time that they actually spent in traveling.* Plans which have that effect are now in use in the iron ore mines of the country and in coal mines in other countries.

In the bituminous mines involved in this dispute the parties have agreed throughout more than fifty years of collective bargaining that wages should be paid on the "face to face" basis; that is, on the basis of time spent at the working places. On July 18, 1940, the Administrator of the Wage and Hour Division of the Department of Labor, following representations made jointly to him by the Operators and the United Mine Workers, expressed the opinion that "the practice of computing working time on a 'face to face' basis in the bituminous mining industry would not be unreasonable" under the provisions of the Fair Labor Standards Act. The Appalachian agreements of 1941 were entered into between the parties in the light of this ruling. They retained the old maximum hours and working time provisions in which compensation was based on the "face to face" principle. The Mine Workers chose at that time "face to face" rather than "portal to portal" pay for their own reasons which they had given to the Wage and Hour Administrator in the letter of July 18, 1940. They agreed to put up with the inequality that comes from the fact that individual mine workers have to spend different periods of time in travel.

When the negotiations for the new contract were initiated in March of this year the mine workers demanded, as they had a right to do, that the new contract should make provision for additional compensation for travel time. Their demand was that the operators should pay for travel time "to conform with the basis and legal requirement for the industry." On August 13, 1941 the United States District Court in Alabama had decided that all time spent underground in iron ore mines was working time and should be included in the computation of the employees' work week under Section 7 of the Fair Labor Standards Act, and on March 16, 1943 this decision was affirmed by the Fifth Circuit Court of Appeals.

[fol. 154] The inequality in the present "face to face" system of payment is measured by the actual time spent by the individual mine worker traveling to and from his

working place in the mine. It cannot be removed by a general increase to all mine workers. After such an increase the inequality would remain just what it was before. Sam Smith who works seven hours at his working place in the mine and has to spend two hours a day getting in and out would still get the same wage as John Jones who works seven hours at his working place in the mine and has to spend only 20 minutes getting in and out.

We have, of course, during our consideration of this dispute, given careful thought to the possibility of working out an agreement which actually takes care of this inequality. We have been stopped by two obstacles either one of which would make impossible the necessary adjustment at this time.

In the first place neither party to the dispute has proposed to us any kind of a plan that would actually take care of this inequality. The only thing that has been suggested is a general wage increase equally applicable to all the mine workers. In our directive order of May 25th, after most careful deliberation, we held that no general wage increase for wage earners could be approved. In the comments accompanying that order we discussed the economic position of the bituminous mine workers and pointed out why we could not approve any general wage increase for them. At a later place in this opinion we have made further reference to this subject, for reasons which appear at that place.

In the second place, the whole economic structure of the bituminous mining industry has been built upon the payment of wages on the "face to face" basis. To now reconstruct the maximum hours and working time provisions applicable to bituminous coal mining, so as to cure the inequality due to different individual travel time, would create utter confusion in the economics and in the wage structure of the industry, which could only adjust itself to this new system over a period of years. The considerations involved in such a change, both economically and with reference to the fair treatment of the individual workers, are so complex that they could be satisfactorily worked out only by a long period of collective bargaining, if at all.

In normal times of peace it would be possible for the interested parties, and for impartial men, to give reasonable consideration to these complex problems, but at the

present time, when the country is engaged in a wartime struggle for its very existence, the uncertainties and disturbances involved in working out such a plan would be intolerable. A time of war is no time to settle long standing and complex questions of this character. This is particularly true, as we pointed out in connection with the north-south differential in the Cotton Textile Cases, when a disturbance of long standing relationships established by years of collective bargaining would require us to dis- [fol. 155] regard our responsibility to stabilize wage rates in conformance with the national stabilization program.

(2) In our directive order of May 25th, after ruling that no general wage increase could be approved, we spoke of the legal claim asserted by the Mine Workers for further compensation under the Fair Labor Standards Act. We referred that claim to the parties for further negotiation as a possible basis for agreement in some approvable wage increase, since payments due under the Fair Labor Standards Act may be approved without regard to the wage stabilization policy defined by the Anti-inflation Act of October 2, 1942. It was, however, made very clear in our directive order of May 25th that any wage increase based upon this claim could be approved, under the wage stabilization policy, only if the amount of the increase were genuinely and reasonably related to the claim advanced by the Mine Workers under the Fair Labor Standards Act. We said that the proposed settlement must be submitted with supporting data "sufficient to enable the Board to determine whether or not it constitutes a genuine settlement of alleged claims arising under the Fair Labor Standards Act, and not an indirect wage increase in violation of the wage stabilization policies."

In the negotiations following our order of May 25th the representatives of the mine workers continued to insist upon a general wage increase of $2.00 a day. No real attempt was made to relate this amount to any amount of compensation that might be due under the Fair Labor Standards Act. The representatives of the mine workers failed to make any report to the Board on these negotiations. The representatives of the operators were unable to submit to the Board any data by which the Board might determine what amount of wage increase would increase would constitute a genuine settlement of the alleged claim.

The mine workers' demand of $2.00 a day was, we were informed, based upon an assumption or estimate that the travel time amounted on the average to an hour and one-half a day; that this travel time should be paid for at the rate of time and one-half because the Appalachian agreements, which provided no payment for travel time, did provide a premium rate of time and one-half for productive working time beyond 35 hours a week. In this way the amount was brought up to an estimated average of $2.25 a day for each underground worker. The United Mine Workers proposed to spread this amount over all the workers including those who did not go underground, and so arrived at the proposed general wage increase of $2.00 for all mine workers. We understand that the Mine Workers subsequently indicated to the Operators a willingness to reduce their demand to $1.50 a day, and that still later in negotiations with the Central Pennsylvania Coal Producers Association there was a tentative agreement upon a further reduction to $1.30 per day.

It is obvious that these figures are out of all proportion to any amount that could possibly be due to the mine workers under the Fair Labor Standards Act, even if the courts should decide all questions in controversy in favor of the [fol. 156] mine workers. The demand is plainly and unmistakably a demand for an "indirect wage increase in violation of the wage stabilization policies," contrary to the Board's directive order of May 25, 1943.

The overtime payment due to an individual mine worker, on the assumption that travel time is working time, under the Fair Labor Standards Act, may be calculated in accordance with the standard method used by the Wage and Hour Division (See Method A in footnote). Under this method the straight-time weekly earnings are divided by the actual hours worked plus the hours spent in traveling to and from the work place to the entrance to the mine. Work and travel hours of 40 and under are compensated at the computed straight-time average hourly rate and hours over 40 at time and one-half the hourly rate. From the sum of straight-time and overtime earnings the actual earnings under the wage contract are subtracted, the remainder constituting the payment required under the Act. For a miner paid at the rate of $1.00 an hour under the Appalachian agreement for work at the face, the extra compensation for a 6-day week for travel time of one hour

or less would be zero and for one and one-half hours would be $1.02. The total liability of any operator under the Fair Labor Standards Act would be the sum of his liability to these workers whose travel time amounted to one hour per day or more. To average the travel time of all miner workers and use that average figure for travel time in the Wage and Hour Division's method of calculation would not measure the operators' liability at all.

Thus, the opportunity we gave to the Mine Workers and the Operators to work out a reasonable settlement of the claim under the Fair Labor Standards Act was not taken advantage of, and they did not reach a settlement. We cannot force upon them a settlement of a lawsuit which we have no power to decide.

As we pointed out in our directive order of May 25, it is not within the province of the National War Labor Board to determine whether or not the law requires payment for all time spent underground in the bituminous coal mines. If the United Mine Workers, or any individual miners seek a settlement of the dispute as to the legal rights of bituminous mine workers to additional compensation under the Fair Labor Standards Act, the Wage and Hour Division of the Department of Labor is the government agency provided for the settlement of such questions subject, of course, to court review as provided by Section 10 of that Act. Our Executive Order #9017 "does not apply to labor disputes for which procedures for adjustment or settlement are otherwise provided until those procedures have been exhausted," and it provides that "nothing herein shall be construed as superceding or in conflict with the provisions of * * * the Fair Labor Standards Act."

Method A:

a. Weekly earnings at straight-time (42 hours x $1.00) = $42.00

[fol. 157] b. Average hourly earnings ($42.00 ÷ 48) = $.875

c. Straight-time earnings for 48-hour week (40 x $.875) = $35.00.

d. Earnings for hours over 40 at time and one-half (8 x $1.312) = $10.50

e. Total earnings for purposes of F. L. S. A. (c ÷ d) = $45.50

f. Total earnings under present wage contract = $45.50.
g. Extra compensation for travel time = 0

As we pointed out in our Directive Order, it is possible at any time, should the parties ever agree to a settlement of this legal claim, for the National War Labor Board to pass upon it and to say whether or not the amount agreed upon is an allowable wage increase representing a genuine settlement of the claim, or a hidden wage increase contrary to the stabilization program. The distribution of the payment involved in any such settlement is a matter for the Wage and Hour Division to approve or disapprove.

Why the Mine Workers' Demand for a General Wage Increase Cannot be Approved

In the directive order of May 25th, we decided that no general wage increase for the mine workers could be approved under the Act of October 2, 1942 and the relevant Executive Orders, Regulations and policies. This national stabilization policy applies, of course, to the mine workers as well as to all other wage earners in the country.

It has been asserted that the mine workers undergo such hardships and earn such low wages that they are entitled to special treatment, out of line with and beyond the limitations of the national stabilization policy. Because of this the Board feels that in this opinion there should be set forth in greater detail the reasons why the mine workers' demand for a general wage increase cannot be approved by the Board.

There are, within the wage stabilization policy, certain circumstances under which special wage adjustments to groups of industrial workers may be approved, even though the wages of these workers have already been increased 15% or more since January 1, 1941.

(1) Wage earners whose wages are insufficient to maintain a decent standard of living may, under this policy, have their wages increased.

But the minimum wage for any mine workers under the present Appalachian agreements is 73.6 cents an hour, and for able-bodied mine workers the minimum is 85.7 cents an hour. That hourly wage rate is certainly above

any level that could be thought of as insufficient to maintain a decent standard of living.

(2) Wage increases may be made to correct relatively low rates within a wage structure where there are sub- [fol. 158] stantial inter-plant inequalities such as to give rise to justifiable dissatisfaction among a particular group of workers whose low wage rates amount to unfair discrimination.

In the Appalachian agreements, however, relative wage rates for different occupations have been carefully worked out by many years of collective bargaining. No objection has been raised by the Mine Workers to these relative rates except in the occupations of greasers, trappers, flaggers, switch-throwers, and slate pickers. This objection has been recognized and taken care of by the Board's Directive Order which provides that all able-bodied workers in these classifications shall be paid not less than .857 per hour and $6.00 per day.

(3) The War Labor Board, under the supplemental directive issued by the Director of Economic Stabilization on May 12, 1943, is authorized to approve within carefully specified limits non-inflationary wage adjustments made with reference to prevailing wage rates in the same industry, or even in other industries where there are comparable occupations. Except in rare and unusual cases such adjustments cannot be above the minimum going wages found by the Board to be sound and tested going rates paid for similar occupations in the labor market area. The adjustments must in all ordinary cases be made within the existing price structure or within the existing levels of production cost. If the Board in an exceptional case approves wage adjustments which affect price ceilings or increase production costs above the levels prevailing in comparable plants or establishments, then such adjustments do not become effective unless and until they are also approved by the Director of Economic Stabilization.

There is no basis for wage increases to the bituminous mine workers under this inter-plant or inter-industry rule.

Basic wage rates are established throughout the bituminous coal industry by negotiated agreements based fundamentally upon the agreed wage rates in the Appalachian area. There are, therefore, no higher wage rates for similar occupations anywhere within the bituminous coal in-

dustry, upon which the Board could base an approval for a wage increase to these mine workers.

In our directive order of May 25th, the hours and earnings of bituminous coal miners were compared with those in other industries. It was pointed out that when the increased demand for coal to meet war requirements and the arrangements for operating the mines on a 6-day week are taken into account, the hourly, weekly, and annual wages of the bituminous coal miners make a very favorable showing with similar earnings reported for industrial workers in other industries.

As we said in the comments accompanying that directive order, the mine workers have already received an average increase in straight-time hourly earnings of 18.2 percent since January 1, 1941. With the provision for a 6-day week and the war time demand for bituminous coal, the mine [fol. 159] workers in March 1943 were able to secure an average weekly take-home of $42.97 for a work week of 38.3 hours which is 65.3 percent greater than their average weekly take-home in January 1941 when they averaged 29.7 hours per week. Most of this increase was due to the substantial rise in weekly hours of work. "Assuming that this increase of weekly hours of work will continue through 1943, under the operation of the 6-day week and the war time demand, it is estimated that the mine workers' average annual income for 1943 will be over $2,150 which is 77.4 per cent greater than in 1940 and 23.8 per cent greater than in 1942."

Taking the industry as a whole, mine workers under the 6-day week who, as in March 1943, work about 38 hours per week at the hourly rates provided for in the Appalachian agreements as amended by the Directive Order of the Board, may expect weekly earnings which will exceed their weekly earnings in March 1941—just prior to the April 1st wage increase of $1.00 or $1.40 a day—by 60.5 percent. Measured in terms of the increases not merely in food but in all the items which go to make up *in terms of the increases not merely in food but in all the items which go to make up* the mine workers' cost of living, this increase amounts to 32.3 percent above March 1941.

It is quite true that these figures are statistical averages without much appeal to the individual worker who has difficulty in making both ends meet. But it cannot be overlooked that these statistical averages truly reflect the present

economic conditions of the workers in the bituminous coal industry, as compared with the conditions under which they have heretofore lived, and as compared with the wage rates and incomes of workers in other industries.

There is no doubt that the mine workers have in the past suffered very great hardships from low wages and substandard living conditions, but in the period since 1932—the low point of the pre-war depression—their average weekly earnings have risen progressively step by step from a deeply substandard level of approximately $14.00 a week in 1933 to approximately $43.00 a week in March 1943 which puts the mine worker up among the higher paid workers in the war industries.

The further wage increase of $2.00 a day demanded now by the Mine Workers is an additional increase of 28.6% on top of the average increase of 18.2% which these wage earners have already received since January 1, 1941, or a total increase of 46.9%.

It is obviously impossible for the War Labor Board to approve any such increase for the mine workers under the national wage stabilization policy. To approve it would fly in the face of decision after decision of this Board in which we have had industries of the country.

Any such departure from the general rule would destroy the whole wage stabilization program. It would defeat its own ends. The resulting increases in costs of production could only have the effect to further increase all prices, in- [fol. 160] cluding particularly farm and food prices, to levels which would nullify the wage increases. It would expose the mine workers themselves to a renewed danger that their payroll dollars would be reduced to small change before they get to the grocery store.

Negotiating Conditions Insisted Upon by the United Mine Workers:

The War Labor Board cannot fail to note that, by the insistence of the United Mine Workers, the negotiations for the new Appalachian Agreements have been carried on under conditions which violate the national no-strike agreement and are in themselves a defiance of the national wage stabilization policy.

The effect of the national no-strike agreement has been, in all other labor disputes in all other industries in America,

that the War Labor Board has been able to carry on its consideration of the dispute free from the coercive pressure that results in war time when vital war production is interrupted or threatened with interruption.

In normal times a strike or a threat to strike is a recognized and permissible accompaniment to collective bargaining. The National Labor Relations Act provides that "nothing in this Act shall be construed so as to interfere with or impede or diminish the right to strike." In the national no-strike agreement this recognized right was deliberately laid aside by American labor for the duration of the war. The War Labor Board was created as a war agency empowered, by agreement, finally to determine industrial disputes without interruption of war production.

It is one thing to use against an employer the economic pressure of a strike in peace time. That pressure has normally an effect limited to economic considerations affecting the individual employer or group of employers. In time of war an interruption of vital war production has an entirely different effect. It becomes a coercive pressure with all the intensity of a destructive attack upon the national welfare. It is for that reason that, in the statement unanimously adopted by the War Labor Board interrupting war production—

In this dispute the United Mine Workers, under the leadership of Mr. Lewis, have repudiated the no-strike agreement and insisted upon coming to the bargaining table with their demands in one hand and in the other hand the threat of a strike in an industry which affects the war production more vitally, perhaps, than any other industry. They have sought to use that threat, including the actual interruption of essential war production, to secure for themselves a favored position at a time when all responsible labor organizations in America have loyally adhered to the no-strike pledge.

The War Labor Board will not participate in any such proceedings, and it will not, under such pressure, approve for the mine workers a wage increase which, for the vital purpose of protecting the wage-earner's dollar, has been denied to wage-earners in other industries.

Opinion by: William H. Davis, Chairman.

[fol. 161] NATIONAL WAR LABOR BOARD

Case No. 111-1284

In the Matter of OPERATORS NEGOTIATING COMMITTEE, APPALACHIAN JOINT CONFERENCE and Operators Negotiating Committee, Southern Appalachian Joint Wage Conference, and United Mine Workers of America

Washington, D. C.,
June 18, 1943.

DISSENTING OPINION

The majority of the Board states that, "since the parties have failed to agree it becomes our duty, under the national no-strike policy and Executive Order No. 9017, finally to determine this labor dispute." Instead of finally determining the dispute, the Board has launched upon a legalistic justification for not finally determining it. Instead, the issues now become more confused than ever, with no final determination in sight for a long time to come.

Although the majority states that "When the negotiations for the new contract were initiated in March of this year the mine workers demanded, as they had a right to do, that the new contract should make provision for additional compensation for travel time", and although the demands culminated in a dispute which vitally affected the entire war effort, this Board, constituted specifically for the purpose of "finally determining" all disputes affecting the war effort, now, in its majority decision, refuses to determine whether any additioanl compensation for travel time or portal to portal pay is due. Many reasons are assigned by the majority of the Board for its rufusal to determine the issue over travel time, but the basic reason assigned is that the Board has no jurisdiction because of conflict with the Fair Labor Standards Act. However, the Board does not hesitate to state that it must approve any attempted settlement of a claim under the Fair Labor Standards Act. Thus, while it avoids determining the question of whether portal to portal increases can be paid on the excuse that so to do would be in excess of its jurisdiction because in conflict with the Fair Labor Standards Act, it nevertheless asserts the right to approve any settlement of a claim under the Fair Labor Standards Act. If it can

approve the settlement without conflict with the Wage-Hour Act, it certainly has the power to determine in the first instance whether increases are due.

Heretofore, the Board has consistently avoided resort to [fol. 162] technicalities and narrow legalisms in an effort to fulfill its duty of finally determining all labor disputes affecting the war effort that come before it. Assuredly, if any labor dispute affects the war effort, it is the present one. In the past the War Labor Board has consistently refused to adopt a technical and narrow construction of either the President's Executive Order which established it and defined its jurisdiction, or the provisions of other laws, including the National Labor Relations Act. The function of this board is to assist in the effective prosecution of the war and to prevent interruptions which threaten to impair this function. Dean Wayne L. Morse, Public Member of the War Labor Board, in an address to the Federal Bar Association on September 17, 1942, summed up this policy in the following sentences:

> "The National War Labor Board has the duty of settling any labor dispute which threatens to 'interrupt work which contributes to the effective prosecution of the war.' Thus, it can be seen that the possible effect of a given labor dispute upon the war effort is the only criterion to be consulted in determining whether the War Labor Board should properly take jurisdiction of the case. It does not matter what the issues are nor who the parties are."

What has brought about a change from this policy will be difficult to understand.

The policy of the Board not to be technical, and even to adjudicate cases involving issues which are within the jurisdiction of other tribunals was demonstrated in several cases.

In the *Sperry Gyroscope* case (Case No. 70), the company had been ordered by the National Labor Relations Board to disestablish an independent union. Although the company appealed to the United States Circuit Court, the War Labor Board ordered the company to recognize another union for the purpose of discussing grievances with its members.

In the *Western Cartridge Company* case it was argued that the company was petitioning the Circuit Court of Ap-

peals for review of the order of the National Labor Relations Board disestablishing an independent union. Yet the War Labor Board took a broad view and ordered the company not to recognize the disestablished union. In that case it went so far as to order the company to reinstate twenty employees pending the National Labor Relations Board's determination of whether the employees had or had not been discharged for union activities.

In the case of *Frank Foundries* (Case No. 95), the War Labor Board adjudicated the subject of discharges of employees, a subject within the jurisdiction of the National Labor Relations Board.

In these cases the Board established the policy that it [fol. 163] would not permit itself to be hedged tightly in by the jurisdiction which was vested in another tribunal.

A similiar approach on the part of the Board may be found in the *Sun Shipbuilding and Drydock Company* case (No. 427) and *Shell Oil Company* (No. 92).

If we were to resort to legalism, then it would seem that on the basis of the present decision of the majority the challenge to the War Labor Board's jurisdiction over the subject matter of the cases aforereferred to was quite proper in the light of the interpretation of the literal language of the President's order establishing the War Labor Board. The War Labor Board, however, looked beyond the literal language of Executive Order 9017 and focused its vision on the basic purpose of the Order. The Board realized that only by such means could it fulfill its basic purpose of preventing labor disputes from interfering "with work which contributes to the effective prosecution of the War."

It is inferred in the majority decision that the miners do have a justifiable basis for asking increases in some amount to compensate for the time spent in traveling from the entrance to the mine to the place of work. For years the miners, engaged in one of the most dangerous of occupations, and in ordinary times earning barely enough to sustain themselves and their families, have suffered this injustice—have, in effect, spent valuable hours in the operators' behalf without being compensated for it. Instead of permitting this injustice to continue, it would appear that this Board, when a dispute concerning the amount of additional compensation owing the miners for additional time spent in working has arisen, which dispute threatens

to affect the war effort, should assume jurisdiction to determine the issues.

When this Board directed the parties to resume bargaining respecting travel time, or portal to portal pay, the clear implication of such direction was that if the parties could not agree on the sum to be allowed for portal to portal pay, this Board, regardless of the reservations set forth in the Order of May 25th, would and could determine that issue. No other conclusion can be arrived at by reasonable men.

The majority points out that, unless travel time is compensated for on an individual basis, inequalities would result. There are practical difficulties attendant upon attempting to determine thousands of individual cases. But the miners who are most immediately concerned have agreed to the principle of compensation on a general basis, and that it is generally a common practice to settle numerous claims, whether legal or economic, on an overall basis. This argument of the majority is no reason for the Board not to take jurisdiction or not to attempt to work out some compensation which will, under all of the circumstances, achieve justice for those concerned.

The majority argues that any attempt to award portal to portal compensation would upset the whole economic [fol. 164] structure of the bituminous mining industry, and the considerations are so complex as to require long periods of collective bargaining to work them out. The fact that the operators and the miners have already apparently agreed on certain adjustments indicates that the confusion and dislocation feared by the majority is not a factor which is insurmountable. Further, in time of war emergency issues must be met as they arise and the dislocations and adjustments can be provided for in times of peace when time for fuller and more detailed study is available. To a greater or lesser extent economic confusion always prevailed in this industry.

The majority contends that the principles enunciated in the "Little Steel" formula is concerned with increases up to a designated percentage, on time worked and being paid for. Thus, a legitimate labor dispute over which we have jurisdiction is presented for determination.

We agree with the majority of the Board in upholding the necessity for honoring the no-strike pledge by all labor, but that does not absolve the Board from the necessity to

perform its duty and finally determine the issues revolving around just grievances of the miners in this labor dispute.

We believe that the issue of compensation for travel time, or portal to portal pay, is a labor dispute over which this Board has jurisdiction, and we believe that an order allowing compensation to the miners for such travel time is not violative of the orders, rules and formulas governing this Board now in force and effect. An order should be made allowing the miners reasonable compensation for travel time.

(S.) George Meany, Robert J. Watt, Van A. Bittner, R. J. Thomas, Delmond Garst, Martin P. Durkin, John Brophy, Matthew Woll.

[fol. 165] Special Concurring Opinion by Wayne L. Morse of WLB

This writer concurs in all the views expressed in the majority opinion. However, for purposes of emphasis, he wished to make the following comments:

1. In the Directive Order of May 25, 1943, the Board ruled that under the wage stabilization policies established by the Act of Congress of October 2, 1942, and Executive Orders 9250 and 9328, the Mine Workers are not entitled to a general increase in the instant case. The record is clear that the straight time hourly wage rates for miners have increased more than 15 per cent since January 1, 1942, and, therefore, the miners are not entitled to a general wage increase under the "Little Steel" formula. Neither are they entitled to a general wage increase to correct substandards of living because the wage rate of $1.00 per hour with resulting weekly earnings under the existing six-day-week arrangement of more than $40.00 cannot be considered substandard wages.

There is no evidence in the record which would justify a general wage increase in this case under that criterion in the National wage policy which permits of increases to correct gross inequities. To the contrary, the record shows that the hourly rates and the earnings of the miners under present production demands compare favorably with wages in other industries. It is true that the wages in a few other industries such as shipbuilding, automobile, and petroleum

refining, are higher, but when the wages of the Mine Workers are compared with American industry generally, it cannot be said that any gross inequities exist which justify giving a general wage increase at this time in excess of the "Little Steel" formula.

Likewise, a general wage increase cannot be justified on the ground that it is needed to aid in the effective prosecution of the war because, as this writer stated in his decision of October 16, 1942, in the Ford case:

> "It would be a reflection upon the patriotism of the * * * employees to attempt a justification of a general wage increase upon the basis of any argument that such an increase should be granted * * * to aid in the effective prosecution of the war. An 'all-out' production effort on the part of American workers does not have to be bought or bribed by inflationary general wage increases, which in turn, endanger our war economy and in the long run, decrease real wages."

2. In the Board's decision of May 25, 1943, it pointed out that any wage adjustments made by the parties in compliance with the Fair Labor Standards Act would be consistent with the National wage stabilization policy. It told the public that any composition which the parties made in settlement of any legal claim under the Fair Labor Standards Act as to travel time from portal to portal would be approved if supported by data showing that the com- [fol. 166] position was a genuine settlement of an alleged legal claim and not an indirect wage increase in violation of the Board's wage stabilization policies.

However, the Board made it perfectly clear that it is not within the province of the Board to determine whether the Fair Labor Standards Law requires payment for all time spent under— Hence the Board referred to the parties for negotiations the matter of adjusting the union's legal claim to compensation for travel time from portal to portal. Unfortunately, the parties were unable to reach any agreement on the issue.

Therefore, the Board must rule that this legal question is one for court determination. If the War Labor Board would attempt to rule whether or not the Mine Workers are entitled to travel time as a matter of law under the Fair Labor Standards Act, it would be exceeding its jurisdic-

tion of the courts under the Fair Labor Standards Act. This the Board will not do.

3. It should not be overlooked that the President of the United Mine Workers of America has rested his claim to portal to portal travel time pay on the theory that the Mine Workers are entitled to such pay as a legal right. He has cited the decision of the Fifth Circuit Court of Appeals in the Tennessee, Coal, Iron, and Railroad Company case, decided March 16, 1943, in support of this contention. However, Mr. Lewis' demand in fact has not been for pay for the actual travel time spent by the individual miner underground, but for an adjustment of travel time pay to be distributed in an equal amount to all the Mine Workers, including those above and below the ground, irrespective of whether the individual Mine Worker actually travels underground.

Thus, Mr. Lewis' demand has not been for compensation for any legal claim that the individual miners may have, but rather, it is a demand for a wage increase for all the miners in excess of the wage stabilization policies of the Board couched in terms of portal to portal pay. It is a demand for a form of payment which could not possibly be collected under the Fair Labor Standards Act, because the very decision which the representatives of the Mine Workers cite makes clear that the portal to portal travel time pay allowed in that case is individual to the employee who travels underground in accordance with the time which he actually travels.

It would be thoroughly dishonest for the War Labor Board in the name of portal to portal pay to grant a wage increase to all miners, including those who travel underground and those who do not. Any pay which the courts might decree the individual miners had coming for the actual time they travel underground could not be ordered by the War Labor Board to be averaged among all the mine workers in the absence of an agreement between the parties to that effect. Any such award by the Board would be recognized for what it really would be; namely, an unjustifiable rationalization for breaking the wage stabilization policy of the Board in order to satisfy the demands of the miners for a general wage increase. Such an action would open the flood gates of general wage increases in excess of the wage stabilization policies of the Govern-

ment because if the United Mine Workers of America should succeed in securing such a wage increase from the Board, many other unions would attempt, with justification, to adopt tactics and demand general increases under one label or another.

[fol. 167] Throughout the history of this case, the War Labor Board has taken the position that the same policies, the same rules, and the same procedures must be applied by the War Labor Board to this case as to all other cases which have come before the Board. It has followed the principle that it must decide all cases on the theory that this is a government of one law and one flag, with equal justice to all. Having found that the facts of the case do not justify a general wage increase under any of the criteria set forth in the Executive Orders which define the wage stabilization policies of the Government, the Board does not propose to circumvent those policies by granting a general wage increase indirectly or by subterfuge under the guise of portal to portal pay averaged over all the workers.

4. Lastly, this writer wishes to point out that the Board has not been diverted from applying the same rules to this case as to all other cases by the Union's resort from time to time to economic action and threats of economic action. It has insisted on seeing to it that the miners receive all that they are entitled to under the wage stabilization policies of the Government in accordance with the record before it, but it has held fast to the principle that they should not receive more than they are entitled to, even though they threaten the use of economic power.

As a result of the economic action taken by the United Mine Workers of America and their officers in violation of the No-strike pledge, there is one issue which has developed in this case which surpasses all others in significance so far as the security of this Nation is concerned; namely, whether or not in the midst of a war the Mine Workers will abide by the same rules and the same laws which are applicable to all other groups. If this issue involving the supremacy of law should ever be sacrificed at the altar of expediency or under coercion of power, the damage to the war effort would be much more costly, not only to national morale, but also to actual war production than would be the losses, unthinkable as they are, which would result from

a coal strike. It is one issue which cannot be compromised if we are to retain a government by law. This writer is confident that 130,000,000 Americans do not want it compromised in this case or in any other.

Opinion by: Wayne L. Morse.

[fol. 168] PLAINTIFF'S EXHIBIT NO. 38-a

Office of War Information, National War Labor Board

For immediate release
June 18, 1943

The following statement was made today by Chairman William H. Davis of the National War Labor Board, in connection with the Board's decision in the dispute involving the bituminous coal operators and the United Mine Workers of America:

"(1) The Mine Workers asked payment for travel in the mines.

"(2) The Mine Workers have throughout many years of very real collective bargaining agreed that they shall be paid for the work they do on the basis of hours worked, at their working places in the mines, without regard to the travel time between the portal of the mine and the working places. In July, 1940, the Mine Workers and the operators jointly asked the Administrator of the Wage and Hour Division to approve that 'fact to face' method of payment as a compliance with the same 'fact to face' basis of payment was incorporated by mutual agreement in the Appalachian Agreements which became effective April 1, 1941.

"(3) It would be possible to correct any inequality that results from basing the pay of all the miners on the hours worked at their working places, regardless of the amount of time that the individual worker has to spend in traveling. The basis of payment might be for all hours during which the miner was underground; that is, from portal to portal. That has been done in other mining industries. It would be a radical change in the bituminous coal industry and would undoubtedly create so much confusion that production would be very seriously reduced and it would probably take many

months of honest collective bargaining to develop any such method for the coal mines that would not bring about an intolerable economic condition of many of the mines and unacceptable conditions for many of the mine workers.

"(4) The United Mine Workers have not proposed to change the 'face to face' basis of payment. On the contrary they have proposed merely to increase the hourly rate under the present contract system. They would not, of course, correct that inequality which comes from varying times of travel, by different mine workers. Sam Smith who works 7 hours at his working place in the mine and has to spend two hours a day getting in and out would still get the same wage as John Jones who works 7 hours at his working place in the mine and has to spend only 20 minutes getting in and out. It would not be in fact payment to the mine workers for portal to portal. It is merely a general wage increase supported by the argument that the mine workers, although they are willing to continue to put up with the inequality that comes from 'face to face' payment, think they ought to have a general wage increase because on the average they will spend a certain amount of time in travel.

"(5) In its Directive Order of May 25, the Board held that it could not, under the National Stabilization Policy [fol. 169] grant a general wage increase to the mine workers. It pointed out that it had already received more than the 15% increase in straight-time hourly rates allowed under the Little Steel formula. It also pointed out that under the present six day week arrangement in the great demand for bituminous coal the weekly and annual earnings of the miners in 1943 would compare very favorably with those of wage earners in other important war industries. In the opinion accompanying the directive order today, we have referred again to this matter. We have pointed out that the minimum for any mine worker's under the present Appalachian agreement is $.736 and for able-bodied mine workers the minimum is $.857 per hour. Of course these minimum rates are above substandard of living rates. It is certainly true that in the past the mine workers have suffered very great hardship from low wages and substandard living conditions. In 1933 the mine workers wages have been progressively increased until in March of this year, 1943, with the six day week and the great war time demand for bituminous coal, their weekly earnings are up to approximately $43.00

per week, which puts them up with the higher paid workers in the war industry. In comparison with January 1, 1941, the average weekly payroll of the mine workers has increased more than 65 per cent. This increase is largely due to an increase in the number of hours per week. If this increase continues in 1943—and there is no reason to suppose that it will not, it is estimated that the mine workers' average annual income for 1943 will be over $2,150.00, which is 77.4% greater than in 1940 and 23.8% greater than in 1942.

"It is obvious that if the War Labor Board approved any general wage increase for the mine workers under these circumstances it would fly in the face of decision after decision of the Board in which we have had to limit the wage increases allowed to the wage earners in most of the great war industries of the country. It would mean that we would be retreating form the whole wage stabilization policy and we would have to set up a new line of stabilization that would permit us to extend similar increases to the wage earners in other industries in which wage increases have been refused under the present policy. The resulting increase in costs of production could only have the effect to further increase all prices including particularly farm and food prices to levels which would nullify the wage increases. It would really mean giving up the fight to protect the value of the wage earners' dollar.

"(6) Having denied the general wage increase in its directive order of May 25, the Board pointed out that the claim of the Mine Workers for travel pay involved the assertion of a legal right under the Fair Labor Standards Act. A legal claim of that kind, if it has any foundation at all, is an unknown liability hanging over the business of every bituminous coal operator, and there is nothing more destructive of business than hidden liens and unknown liabilities. We pointed out that if the parties could honestly settle this legal claim on a basis genuinely related to what might legally be recovered under the Fair Labor Standards Act, the War Labor Board would be able to approve the payment of the amount of money involved in the settlement because the Statutes, and Executive Orders, under which the Board operates permit, of course, the payment to any worker of any additional compensation to which he is entitled by law.

[fol. 170] "We extend to the parties an opportunity to try to settle this legal claim by agreement, but they have been unable to do so. We cannot force upon them a settlement of a lawsuit which we have no power to decide. Therefore, we have been unable to approve any further wage increase to the mine workers than the increase in vacation pay and the payment by the operators for safety equipment and devices, blacksmithing, and necessary tools and equipment, which we approved in our directive order of May 25."

[fol. 171] PLAINTIFF'S EXHIBIT No. 38-b

National War Labor Board

Washington, D. C.,

June 18, 1943.

Case No. 111-1284

In the Matter of OPERATORS NEGOTIATING COMMITTEE, APPALACHIAN JOINT CONFERENCE, and Operators Negotiating Committee, Southern Appalachian Joint Wage Conference, and Central Pennsylvania Coal Producers' Association, and United Mine Workers of America

DIRECTIVE ORDER

By virtue of and pursuant to the powers vested in it by Executive Order 9017 of January 12, 1942, the Act of Congress of October 2, 1942, and the Executive Orders and Regulations issued thereunder, the National War Labor Board hereby directs that:

A. Contracts:

I. Except as hereinafter provided and unless changed by mutual agreement of the parties thereto, the following agreements and memoranda shall remain in effect to and including March 31, 1945:

(1) The Appalachian Agreement of April 1, 1941.

(2) The Six-Day Supplemental Agreement thereto, dated January 29, 1943.

(3) The "Memorandum of Understanding Affecting Vacation Clause of Appalachian Joint Agreement, Executed in Washington, D. C., on June 19, 1941."

(4) The Southern Wage Agreement of July 5, 1941.

(5) The Six-Day Supplemental Agreement thereto, dated February 10, 1943.

(6) The "Memorandum of Understanding Affecting Vacation Clause of Southern Wage Agreement, Executed, in Washington, D. C., on July 5, 1941."

(7) The "Explanatory Memorandum in re the Appalachian Wage Agreement, dated May 12, 1939, Made by John L. Lewis, President of the United Mine [fol. 172] Workers of America, to the Appalachian Joint Conference."

(8) All District Agreements underlying either the Appalachian Agreement of April 1, 1941, or the Southern Wage Agreement of July 5, 1941.

II. The Appalachian Agreement of April 1, 1941, and the Southern Wage Agreement of July 5, 1941, will be amended as follows:

(1) The first paragraph of the Preamble of the Appalachian Agreement of April 1, 1941, shall be amended to read as follows:

"This Agreement, made the — day of ——, 1943, between the Georges Creek & Upper Potomac Coal Association, Somerset County Coal Operators' Association, Western Pennsylvania Coal Opeperators' Association, Ohio Coal Association, Michigan Coal Operators' Association, Northern Panhandle of West Virginia Coal Operators' Association, Northern West Virginia Coal Association, voluntary associations on behalf of each member thereof and other companies signatory hereto, hereinafter referred to as the Operators, party of the first part, and the International Union, United Mine Workers of America, and Districts 2, 3, 4, 5, 6, 16, 17, 19, 24, 30, and 31, hereinafter referred to as the Mine Workers and on behalf of each member thereof, party of the second part. (New Districts of the United Mine Workers may be established in this territory.)"

(2) The first paragraph of the Preamble of the Southern Wage Agreement of July 5, 1941, shall be amended as follows:

"This Agreement, made the — day of ——, 1943, between the Southern Coal Producers' Association representing individual coal operators, members thereof, the Operators' Association of Williamson Field, Big Sandy-Elkhorn Coal Operators' Association, Hazard Coal Operators' Association, Harlan County Coal Operators' Association, Kanawha Coal Operators' Association, Logan Coal Operators' Association, New River Coal Operators' Association, Pocahontas Operators' Association, Winding Gulf Operators' Association, Greenbrier Coal Operators' Association, Upper Buchanan Smokeless Coal Operators' Association, Virginia Coal Operators' Association and Southern Appalachian Coal Operators' Association, voluntary associations on behalf of each member thereof hereinafter referred to as the Operators, party of the first part, and the International Union, United Mine Workers of America, and Districts 17, 19, 28, 29, and 30, hereinafter referred to as the Mine Workers and on behalf of each member thereof, party of the second part. (New Districts of the United Mine Workers may be established in this territory.)"

(3) The provisions relating to *Basic Tonnage Rates* in each Agreement shall be amended by striking out the final paragraph thereof, "Yardage and deadwork rates in all Districts shall be increased fifteen per cent (15%)"; provided, however, that such increases are already in effect.

(4) The provisions relating to *Vacations with Pay* in each Agreement shall be amended to substitute, at the appropriate places therein, "July 3, 1943" for "June 28, 1941"; "July 12"; "fifty" for "twenty"; "$50.00" for "20.00"; "1944" for "1942"; "July 1" for "June 27"; "July 10" for "July 6".

[fol. 173] (5) The Miscellaneous Provisions in each Agreement shall be amended to read as follows:

"The Operators shall furnish necessary tools to day and monthly men without charge. They shall also furnish necessary tools or a money equivalent to mine workers employed at tonnage, yardage or footage rates.

"Safety equipment and devices, including electric

cap lamps, shall be furnished by the Operators without charge. This shall not include, however, personal wearing apparel, such as hats, clothing, shoes and goggles.

"No charge shall be made for blacksmithing.

"Matters affecting cost of explosives and house coal are referred to the District Conferences.

"To the extent it has been the custom in each District, all bottom coal shall be taken up and loaded by the Mine Worker.

"The cutter shall cut the coal as directed by the operators.

(6) The Protective Wage Clause in each Agreement shall be amended by adding thereto the following sentence:

"For the duration of the War no strike shall be either maintained hereunder."

It was brought to the Board's attention by Representatives of the Operators at the hearing on June 10 that the Mine Workers had insisted upon retaining in the Appalachian Agreement and in the Southern Wage Agreement the so-called "Protective Wage Clause." This clause provides that:

> "If the United Mine Workers make a wage agreement during said period (the period of the Agreement) covering wages or working conditions with any person, association, or district within the * * * area on a basis more favorable than the above (more favorable than the terms and conditions recited in the Agreement), then this Agreement shall be modified so that all parties to the * * * Agreement shall receive all the benefits of such more favorable agreement."

The effect of this Clause is that if any Operator agrees to a wage increase, the amount of that increase is not binding upon him unless all other operators agree to the same wage increase. The sound purpose of this is to insure equal wage rates throughout the competitive areas.

To implement this sound provision the Protective Wage Clause goes on, however, to provide that:

> "The International Union, United Mine Workers of America, reserves the right to call and maintain strikes

throughout the entire * * * area when necessary to preserve and maintain the integrity and competitive parity of this Agreement. Such strikes shall not be [fol. 174] deemed a violation of this Agreement. The International Union will give reasonable notice to all parties of any such action."

When they now insist upon this provision, the United Mine Workers are insisting that they may be free to call a general strike notwithstanding the no-strike provision of the Agreements and notwithstanding the National No-Strike Agreement and the declared policy of the nation based on that No-Strike Agreement.

The Board has, therefore, ordered that for the duration of the War no strike shall be either called or maintained under this Clause.

(7) The provision relating to *Appalachian Joint Conference* in the Appalachian Agreement of April 1, 1941, and the provisions relating to *Southern Wage Conference* in the Southern Wage Agreement of July 5, 1941, shall be amended to provide for such Conferences in March 1945.

(8) Each Agreement shall contain the following provision relating to *Leased Mines:*

"The Operators agree that they will not let any operating mines subject to this Agreement as a subterfuge for the purpose of avoiding the provisions of this Agreement."

(9) Each Agreement shall contain the following provision relating to Duration of Agreement.

"This Agreement shall be effective as of April 1, 1943, and shall continue in effect to and including March 31, 1945, except as to general wage rates, which may, on thirty (30) days' notice from either party be reopened for negotiation at the end of the first contract year. The foregoing sentence shall not preclude the parties from mutually agreeing at any time during the term of this Agreement, on changes in general wage rates, subject to such approval by the appropriate governmental agencies as may be required by the Act of Congress of October 2, 1942, and the Executive Orders and Regulations issued thereunder. Further-

more, if at any time during the term of this Agreement a significant change occurs in governmental wage policy, either party shall have the right to request negotiations on general wage rates."

(10) The final two paragraphs of *Schedule A* in each Agreement shall be amended to read as follows:

"Cutting rates on track mounted machines shall be those provided in the various District Agreements effective April 1, 1941."

(11) The provisions relating to *Schedule B* in each Agreement shall be amended as follows:

(a) Under the heading, "General Labor Classifications, Inside," the following sentence shall be added:

"Able-bodied labor employed as Greasers, Trappers, Flaggers, Switch Throwers shall be paid at a rate not less than $.857 per hour and $6.00 per day." [fol. 175] In the District Agreements the parties, without further approval of the Board, may agree to pay ablebodied labor employed as Greasers, Trappers, Flaggers, and Switch Throwers, the rate paid to Inside Unclassified Labor, namely, $.966 per hour and $6.75 per day.

(b) Under the heading, "General Labor Classifications, Outside," the following sentence shall be added:

"Able-bodied labor as Slate Pickers shall be paid at a rate not less than $.857 per hour and $6.00 per day."

(c) The provision as to Strip Mine Wages shall be amended to read as follows:

"Mine workers employed in strip mines or pits shall be paid as provided in the various District agreements effective April 1, 1941."

III. The *Memoranda of Understanding Affecting Vacation Clause,* referred to above shall be amended to read as follows:

"In the interest of the National War effort, it is agreed that the vacation period shall be eliminated in the year 1943 without prejudice to or modification of

the existing vacation clause of the Agreement. This arrangement shall in no wise affect the payment of $50.00 to be made by all coal companies to each individual in conformity with the terms of the Agreement.

"The above payment to individual Mine Workers, entitled to vacation, shall be made at the option of the employing coal company, except that in all cases, full payment of the amount prescribed shall be made not later than the last pay day occurring in the month of June, 1943.

"The vacation payment for the 1944 period shall be made on the last pay day occurring in the month of June of that year."

IV. The Six-Day Supplemental Agreements referred to above shall be amended to include the following paragraphs:

"All employees at mines working six days per week shall be given a fair and equal opportunity to work on each of such six days. Laying off individual workmen during the week for the purpose of denying them six days work is prohibited during the term of this Supplemental Agreement. This shall not, however, be construed as a guarantee to give each employee work for six days per week where work is prevented by reasons of breakdowns, accidents, operating requirements, unsafe conditions, or for reasons beyond the control of management.

"Upon the cessation of hostilities in the War, the workweek shall automatically revert to five days."

V. The provisions of the Appalachian Agreement of April 1, 1941, of the Six-Day Supplemental Agreement thereto, dated January 29, 1943, of the underlying District No. 2 Wage Agreements, of the "Memorandum of Understanding Affecting Vacation Clause of Appalachian Joint Agreement, Executed in Washington, D. C., on June [fol. 176] 19, 1941, of the "Explanatory Memorandum in re Appalachian Wage Agreement dated May 12, 1939, Made by John L. Lewis, President of the United Mine Workers of America, to the Appalachian Joint Conference," as such agreements and memoranda have been amended above, shall govern the collective bargaining relations between

the Central Pennsylvania Coal Producers' Association, and the International Union, United Mine Workers of America, and District 2, United Mine Workers of America to and including March 31, 1945.

B. Other Issues:

1. Spotting of Cars:

In keeping with the provisions relating to District Conferences in the Appalachian Agreement of April 1, 1941, and the Southern Wage Agreement of July 5, 1941, the demand of the Mine Workers that the Operators "be responsible for delivering mine cars to and from the miners' working places" shall be referred by the parties to the District Conferences for disposition in accordance, so far as practicable, with the opinion expressed by the Board in its Directive Order of May 25.

II. *Portal-to-Portal*

The demand of the Mine Workers that "the maximum Hours and Working Time provisions be amended to establish portal-to-portal for starting and quitting time for all underground workers" is hereby denied.

The Mine Workers remain free to press their demand before the Administrator of the Fair Labor Standards Act and in the Federal Court; and the Operators retain their rights to seek pertinent administrative and court rulings.

The parties also remain free to agree to a settlement of their prospective lawsuit. If they would agree to a settlement, the Board, as the agency of government charged with administration of the wage stabilization program, will rule whether the agreement is a genuine settlement of the lawsuit compatible with the stabilization program.

(S.) William H. Davis, Chairman, George W. Taylor, Frank P. Graham, Wayne L. Morse, George H. Mead, Cyrus S. Ching, Almon E. Roth, Horace B. Horton.

Dissenting: (S.) Van A. Bittner, John Brophy, George Meany, Robert J. Watt. (Seal.)

[fol. 177] PLAINTIFF'S EXHIBIT NO. 39

ILLINOIS COAL OPERATORS ASSOCIATION

and

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, and DISTRICT NO. 12, UNITED MINE WORKERS OF AMERICA

SUPPLEMENTAL AGREEMENT

It is hereby agreed by and between the Illinois Coal Operators Association, the International Union, United Mine Workers of America, and District Number 12, United Mine Workers of America, that the Wage Agreement between the above named parties, made and entered into as of April 1, 1941, and effective to and including March 31, 1943, as heretofore amended and supplemented by Supplemental Agreement, dated February 11, 1943, be and it hereby is extended from April 1, 1943 to and including March 31, 1945, upon the same terms and conditions therein contained, as hertofore so amended and supplemented, except as follows:

1. By reason of the emergency of war and as a contribution to the public welfare it is agreed that an additional one hour per day work time shall be added to the present basic seven hour workday making an eight hour operating shift for such time unit, except when lack of market demand, breakdown of equipment, accidents, shortage of transportation, acts of God, or other causes beyond the control of the operator or operators prevent: *Provided*, however, that lack of market demand shall not permit the operators to operate on less than an eight hour shift. The established rates of pay shall be continued for the first seven hours of each operating day except the sixth operating day of each week, and time and one-half and rate and one-half shall be paid for the eighth hour of each work day except the sixth operating day of each week; and for all hours worked on the sixth operating day of each week time and one-half and rate and one-half shall be paid. This paragraph shall not be construed to require payment of time and one-half or rate and one-half on Saturday if the individual mine worker has voluntarily laid off on Monday, Tuesday, Wednesday, Thursday, or Friday, of such week.

All employees at mines working six days per week shall be given a fair and equal opportunity to work on each of

such six days. Laying off individual mine workers during the week for the purpose of denying them six days' work is prohibited during the term of this Supplemental Agreement.

2. The tonnage, yardage and dead work rates shall be the existing tonnage, yardage and dead work rates for seven-eighths of the tonnage, yardage and dead work for each day plus rate and one-half for the remaining one-eighth of the tonnage, yardage and dead work.

3. The Inside Day Wage Scale for able-bodied trappers, flaggers and switch-throwers (to answer telephone when required) (based on the seven-hour week day) shall be not less than $6.00.

The Inside Day Wage Scale for able-bodied greasers (based on the seven-hour work day) shall be not less than $6.75.

4. The Outside Day Wage Scale for able-bodied slate-[fol. 178] pickers (based on the seven-hour work day) shall be not less then $6.09.

5. The provisions relating to vacations with pay are hereby amended to substitute, at the appropriate places therein, Fifty ($50.00) Dollars for Twenty ($20.00) Dollars.

In the interest of the National war effort, it is agreed that the vacation period shall be eliminated for the year 1943 without prejudice to or modification of the existing vacation clause of the Agreement. This arrangement shall in no wise affect the payment of Fifty ($50.00) Dollars to be paid by all operators to each individual in conformity with the terms of the Agreement.

The above payment to individual mine workers, entitled to vacation, shall be made at the option of the employing operator, except that in all cases full payment of the amount prescribed shall be made not later than the last pay day occurring in the month of June, 1943.

The vacation payment for the 1944 period shall be made on the last pay day occurring in the month of June of that year.

6. After the effective date of this Supplemental Agreement the operators shall furnish all mine workers' tools at the operators' cost. At the option of each tonnage mine

worker the operator shall purchase and the mine worker shall sell the tools the tonnage mine worker now owns at a price which is equal to one cent per ton for all coal mined by each tonnage mine worker between April 1, 1943, and the effective date of this Supplemental Agreement, with a minimum payment of $3.00.

Safety equipment and devices, including electric cap lamps, and also carbide lamps, shall be furnished by the operators without charge. This shall not include, however, personal wearing apparel such as hats, clothing, shoes and goggles. In lieu of furnishing carbide lamps and carbide the operator may at his option pay to the mine workers who use carbide lamps at their work 6 cents per day, and the mine workers shall continue to furnish their own carbide lamps and carbide.

No charge shall be made for blacksmithing.

7. In the event of a dispute as to the starting time between any operator and the local union at any mine, either party may make a case of such dispute and thereafter such case shall be handled in accordance with the provisions of the Agreement governing disputes.

8. If the United Mine Workers make a wage agreement during the period of this Supplemental Agreement, covering wages or working conditions with any person, corporation, association, or district, more favorable to the operators than as contained herein, then this Supplemental Agreement shall be modified so that the operators who are parties hereto shall receive all of the benefits of such more favorable agreement.

For the duration of the Supplemental Agreement no strikes shall be either called or maintained hereunder.

[fol. 179] 9. The operators agree that they will not lease any operating mines subject to this Supplemental Agreement as a subterfuge for the purpose of avoiding the provisions of this Supplemental Agreement.

10. It is agreed that the operators who are parties hereto shall be parties to and participate in the conferences to negotiate the basic wage agreement to be effective after March 31, 1945.

11. In full settlement and discharge of and release from claims for all portal-to-portal compensation accruing prior

to April 1, 1945, and in settlement and discharge of the impending litigation by the mine workers against the operators for such portal-to-portal compensation, each mine worker shall be paid in addition to the sums provided for in said Wage Agreement and this Supplemental Agreement, the amount of $1.25 for each day worked, retroactive to April 1, 1943 and hereafter to April 1, 1945; *Provided*, that such retroactive payments shall be made in equal installments during the six months commencing on the first day of the calendar month following the effective date of this Supplemental Agreement, and *Provided*, further, that this paragraph shall be without prejudice to any right of any party signatory to this Supplemental Agreement after April 1, 1945.

12. This Supplemental Agreement, as to general wage rates, may, on thirty (30) days' notice from either party, be reopened for negotiation at the end of the first contract year. The foregoing sentence shall not preclude the parties from mutually agreeing at any time during the term of this Supplemental Agreement, on changes in general wage rates, subject to such approval by the appropriate governmental agencies as may be required by the Act of Congress of October 2, 1942, and the Executive Orders and Regulations issued thereunder. Furthermore, if at any time during the term of this Supplemental Agreement a significant change occurs in government wage policy, either party shall have the right to request negotiations on general wage rates.

13. This Supplemental Agreement is an integrated instrument and its respective provisions are interdependent, and shall be in effect only after the approval hereof by the appropriate governmental agencies and after the granting by the Office of Price Administration of advances in maximum prices sufficient to cover the increased costs occasioned hereby.

Executed in triplicate in the City of Washington, D. C. the 20th day of July, 1943.

Illinois Coal Operators Association By (s) George F. Campbell, President. United Mine Workers of America, International Union, By (s) John L. Lewis, President; (s) John O'Leary, Vice Presi-

dent; (s) Thomas Kennedy, Secretary-Treas. (s) D. W. Buchanan, Hubert E. Howard, George F. Campbell, Sub-Scale Committee. District No. 12, United Mine Workers of America, by (s) Ray Edmundson, President; (s) Hugh White, Vice President; (s) Walter J. James, Secretary-Treasurer; (s) John H. Jones, Charles Brosch, Walter C. Jenkins, Sub-Scale Committee.

[fol. 180] PLAINTIFF'S EXHIBIT No. 39-a

Memorandum

August 31, 1943.

The National War Labor Board has just released its formal order and opinion in the Illinois Coal Operators' case, which involved the portal-to-portal pay clause and other matters. The order and opinion are quoted in full below.

J. D. Battle, Executive-Secretary.

National War Labor Board, Washington

August 24, 1943.

Case No. 13-279. (Request for Approval of an Agreement)

In the Matter of ILLINOIS COAL OPERATORS ASSOCIATION and United Mine Workers of America and District 12, United Mine Workers of America

Order

By virtue of and pursuant to the powers vested in it by Executive Order No. 9017 of January 12, 1942, the Act of Congress of October 2, 1942 and the Executive Orders and Regulations issued thereunder the National War Labor Board hereby rules that:

(1) Sections 1, 2, 7, 8, 9, 10, 12 and 13 of the Supplemental Agreement do not require Board approval.

(2) Sections 3, 4, 5, and 6 of the Supplemental Agreement are approved.

(3) Section 11 of the Supplemental Agreement is disapproved.

William H. Davis, Chairman; George W. Taylor, Vice Chairman; Frank P. Graham, Wayne L. Morse, Horace B. Horton, Cyrus S. Ching, Frederick S. Fales, Walter T. Margetts.

Dissenting on Section 11: Robert J. Watt, Matthew Woll, Van A. Bittner, John Brophy.

[fol. 181] PLAINTIFF'S EXHIBIT No. 39-b

National War Labor Board, Washington

August 24, 1943.

Case No. 13-279

IN THE MATTER OF ILLINOIS COAL OPERATORS ASSOCIATION

and

UNITED MINE WORKERS OF AMERICA AND DISTRICT 12, UNITED MINE WORKERS OF AMERICA

OPINION

This case is brought to the National War Labor Board by a joint request of the Illinois Coal Operators Association and the United Mine Workers of America for approval of a wage agreement entered into by them on July 20, 1943, as a result of collective bargaining.

In acting upon such an agreement the powers and duties of the National War Labor Board are strictly limited. We have authority to pass only upon the wage items of the agreement, and to disapprove them only if they are inconsistent with the national wage stabilization policy. The principles and yardsticks of that policy are set forth in Executive Order #9250 of October 3, 1942, Executive Order #9228 of April 8, 1943 and the Supplemental Policy Directive of May 12, 1943, all issued under the provisions of the Act of Congress of October 2, 1942.

The agreement between the Illinois Coal Operators Association and the United Mine Workers as a supplemental agreement extending and modifying the 1941-1943 wage

agreement. The modifications are expressed in thirteen numbered paragraphs.

The 1941-1943 agreement provides, with certain exceptions not relevant to the present question, that the 7-hour day, 5-day week (35 hours per week) shall prevail in the mines at the usual working places, with an overtime premium at the rate of time and one-half for work beyond seven hours in any one day or 35 hours in any one week. Paragraphs 1 and 2 of the supplemental agreement now before us modify the basic agreement to provide for an 8-hour day, with premium pay for the eighth hour at the rate of time and one-half for day workers and rate and one-half for piece workers. The Board has ruled that this mutually agreed upon extension of the working time, with provision of premium pay in accordance with the 1941-1943 agreement, is not a wabe increase requiring the approval of the National War Labor Board. This ruling follows the precedent established by the Board when on December 5, 1942, in response to an inquiry from the Administrator of the Office of Price Administration, the Board ruled that an agreed modification of the 1941-1943 Appalachian Agreement to provide for the 6-day week with premium pay at the rate of time and one-half rate and one-half for seven hours beyond the prevailing thirty-five hour week was not a wage increase that required the approval of the Board.

[fol. 182] Paragraphs 3, 4, 5, and 6, of the Illinois agreement now before us have to do with (1) payment to able-bodied trappers, flaggers, switch throwers, greasers and slate pickers of the minimum wage established by the 1941-1943 contract for able-bodied employees generally (2) the increase of vacation pay from $20.00 to $50.00 and (3) the furnishing by the operators to the mine workers, without cost, of toools, safety equipment and devices and blacksmithing. These wage adjustments are of the same nature as the wage adjustments allowed in Section A, II; items 4, 5, and 11 (a) and (b) of our Directive Order of June 18, 1943, in the Appalachian case (Case No. 111.1284). These wage adjustments are not inconsistent with the stabilization policy, and the Board has approved them.

Paragraphs 7, 8, 9, 10, 12, and 13 of the supplemental agreement is not relative to wages and do not require approval of the War Labor Board.

Paragraph 11 of the supplemental agreement is presented to the Board as "a settlement, discharge of and release from

all claims for portal-to-portal compensation accruing prior to April 1, 1945," the date of termination of the submitted agreement. The Board has disapproved this part of the agreement on the ground that it does not constitute a genuine settlement of alleged claims arising under the Fair Labor Standards Act.

Paragraph 11 provides for a general wage increase of $1.25 a day to all workers in and about the mines, including those who go underground and those who work outside the mines. This proposed general wage increase requires critical examination on our part under the wage stabilization policy—and if approved by us it would be subject to review by the Economic Stabilization Director—because it is accompanied by a proposed price increase. The supplemental agreement expressly provides that it "shall be in effect only * * * after the granting by the Office of Price Administration of advances in maximum prices sufficient to cover the increased costs occasioned hereby."

The Supplemental Policy Directive of May 12, 1943, modifying Executive Order #9328 of April 8, 1943, provides that "Maladjustments between wages and the cost-of-living will be considered by the Board only for the purpose of correcting substandard conditions of living, or determining adjustments within the 15% limit of the Little Steel formula." This rule has been applied by the Board to deny a general wage increase to many hundreds of thousands of industrial wage earners in all parts of the country. It was applied by the Board to deny a general wage increase to the Appalachian coal miners in our Directive Orders of May 25 and June 18, 1943. It must, of course, also be applied to the Illinois mine workers.

The Illinois mine workers have already had, since January 1, 1941, an increase in their straight-time hourly rates up to the limit of the Little Steel formula. Their hourly rates are too high to permit the suggestion that they need to be increased for the purpose of correcting substandard conditions of living. Therefore, under the national wage stabilization policy the War Labor Board could not approve a further general wage increase for these Illinois mine workers.

[fol. 183] But the mine workers claim that under the Fair Labor Standards Act they are legally entitled to additional compensation for travel time. As we pointed out in our

opinion of May 25, 1943, in the Appalachian case, wage adjustments made in compliance with the Fair Labor Standards Act are not inconsistent with the national wage stabilization policy. The Act of Congress of October 2, 1942, provides that "no action shall be taken under authority of this Act with respect to wages or salaries (1) which is inconsistent with the provisions of the Fair Labor Standards Act * * *" and Executive Order #9250 specifies that "nothing in this Order will be construed as affecting the present operation of the Fair Labor Standards Act. * * *" If, therefore, the wage adjustment proposed in paragraph 11 of the Illinois supplemental agreement were in fact a genuine settlement of the legal claim of the mine workers under the Fair Labor Standards Act we could approve it.

We understand very well what a good thing it would be if we could approve this agreement and put an end to the wage dispute in the bituminous coal industry. We recognize and sympathize with the mine workers' desire to have a grave responsibility to preserve the wage stabilization policy. We are required to do that not only by the Executive Orders under which we operate but also in justice to the multitude of workers who have accepted our decisions denying them general wage increases under that policy. And we owe that obligation also to all of our citizens whose economic status would be undermined by inflationary price increases, including wage earners in the low wage and fixed wage groups, persons dependent upon fixed incomes from investments and the millions of people who have put their savings into life insurance policies.

The only way we can honestly discharge this responsibility, when we are called upon to decide whether the wage increase proposed in the Illinois agreement should or should not be approved, is to satisfy ourselves that the amount of the proposed wage increase is genuinely and reasonably related to the claim advanced by the mine workers under the Fair Labor Standards Act. We pointed that out in our opinion of May 25 and June 18, 1943, and we said that the proposed settlement must be submitted "with supporting data sufficient to enable the Board to determine whether or not it constitutes a genuine settlement of alleged claims arising under the Fair Labor Standards Act, and not an indirect wage increase in violation of the wage stabilization policies."

The proposed settlement is now before us and not supported by any such data and we cannot approve it.

At the hearing before us on August 3, 1943, it was frankly admitted that no additional compensation is due to a mine worker under the Fair Labor Standards Act unless he has spent at his work, including productive time and travel time, more than 40 hours a week* and counsel for both parties admitted that their submission to the Board did not include any data to show whether any mine workers and if so, how many, have worked or now work more than 40 hours a week, counting travel time as working time.

We cannot approve under the Executive Orders by which we are bound, an out-of-court settlement of the legal claims [fol. 184] arising under the Fair Labor Standards Act unless we have before us fair estimate, supported by real data, of the amount of additional money compensation that would be due to the miners under that Act if the courts held that travel time in the bituminous coal mines is working time for which compensation is owed under the Act. That is the practical effort of our decision in the Appalachian case, as pointed out in our opinions of May 25 and June 18, 1943. In no other way can we tell whether the amount of the increase offered as a settlement is genuinely and reasonably related to the claim advanced by the mine workers under the Fair Labor Standards Act.

The proposed settlement now submitted to us is not related at all to the amount of possible recovery under the Fair Labor Standards Act. The figure $1.25 per day is arrived at by processes of rationalization which wholly ignore the fact that the mine workers are not entitled to extra compensation under the Fair Labor Standards Act until the weekly time exceeds 40 hours.

William H. Davis, Chairman.

There was a dissenting opinion signed by Labor Members Van A. Bittner, John Brophy, Carl J. Shipley, and Delmond Garat. Their dissenting opinion follows:

Portal to Portal Pay

We dissent from the majority decision on the ground that

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*Under the Fair Labor Standards Act this time was 44 hours a week from October 1938 to October 1939 and 42 hours a week from October 1939 to October 1940.

the coal miners are entitled to receive payment for their travel time underground. Our reasons are as follows:

(a) The administrative ruling of the applicable provision of the Fair Labor Standards Act, as confirmed by the Circuit Court of Appeals for the Fifth Circuit, is to the effect that travel time underground in mines other than coal mines should be considered as working time for the purposes of the Fair Labor Standards Act. Certainly there is no distinction between coal mining and other mining.

(b) The National War Labor Board has approved the suggest - - - that coal miners receive time and one-half for all work performed in excess of 7 hours in any one day and is specifically approved by the provisions of the Illinois contract which contains such provision. This ruling has been made independent of the provisions of the Fair Labor Standards Act which provides for time and one-half for work performed in excess of 40 hours in any one week. In other words, the National War Labor Board has relied upon the provisions of previous contracts to determine the basis for the payment of overtime.

(c) Since the outstanding collective bargaining contracts in the coal industry provided for time and one-half in excess of 7 hours in any one day, and since travel time underground is working time, we are of the opinion that this Board should direct, and if the parties so agree this Board should approve, the payment to the coal miners for their time spent underground on the basis of premium pay of time and one-half in excess of 7 hours in any one day.

[fol. 185] PLAINTIFF'S EXHIBIT No. 40

Supplemental Agreement Between the Illinois Coal Operators Association, the International Union, United Mine Workers of America, and District No. 12, United Mine Workers of America

It is hereby agreed by and between the Illinois Coal Operators Association, the International Union, United Mine Workers of America and District No. 12, United Mine Workers of America, that the Wage Agreement between the above-named parties, effective to and including

March 31, 1943, as amended and supplemented by the Supplemental Agreement providing for the six-day week, be and it hereby is, extended from April 1, 1943 to and including March 31, 1945, upon the same terms and conditions therein contained, as heretofore so amended and supplemented, except as follows:

1. By reason of the emergency of war and as a contribution to the public welfare it is agreed that for inside employees working on a day wage basis an additional one and one-half hours per day shall be added to the present basic seven-hour work day, making an eight and one-half hour shift at straight time for inside employees, including travel time, and excluding lunch time which shall not exceed thirty minutes, and that for outside employees (including strip mine and coke oven employees) an additional one hour per day work time at time and one-half shall be added to the present basic seven-hour work day, making an eight-hour shift for outside employees, excluding lunch time which shall not exceed thirty minutes, except when breakdown of equipment, accidents, shortage of transportation from the mine, or other causes beyond the control of the operator or operators prevent; *Provided, however,* that lack of market demand shall not permit the operators to operate on less than an eight hour shift for outside employees. Outside employees whose normal work day heretofore has been eight hours shall work eight hours and twenty minutes, for the first eight hours of which they shall be paid time and one-half at their hourly rates based on a seven-hour day.

Any employee in any classification may be required to work under another classification for which he is competent provided that the rate of pay for his regular classification shall not be reduced; and Further Provided, that when he is required to work under a classification for which a rate higher than that of his regular classification is paid he shall be paid at such higher rate for such time.

Work time shall begin at the portal and end at the portal; but in shaft mines, for the purpose of making the operations of lowering and hoisting men orderly and safe, the man trips shall leave the bottom ten minutes after the start of each eight and one-half hour shift and shall arrive at the shaft bottom five minutes before the end of each eight and one-half hour shift (it being understood that

the eight and one-half hours are exclusive of the lunch period.

The established rates of pay for inside men working on a day wage basis shall be continued for the first eight and one-half of each of the first five operating days of each week except where the aggregate of such hours during such first five working days exceeds forty, and then an additional one-half time shall be paid for each hour in [fol. 186] excess of such forty hours; and for all hours worked on the sixth operating day of each week time and one-half shall be paid. This paragraph shall not be construed to require payment of time and one-half on Saturday if the individual mine worker has voluntarily laid off on Monday, Tuesday, Wednesday, Thursday, or Friday of such week.

All employees at mines which produce coal six days per week shall be given a fair and equal opportunity to work on each of such six days. Laying off individual mine workers during the week for the purpose of denying them six days' work is prohibited during the term of this Supplemental Agreement.

Work performed on the seventh consecutive day is optional, but when performed shall be paid for at double rates.

Time and one-half shall be paid for any time worked in excess of the regular shift in any consecutive twenty-four hour period or for work in excess of forty hours in any one week, *Provided*, that this principle shall not be used to pyramid the payment of overtime, and Provided, further, that time and one-half shall not be paid where the regular rotation of shifts requires the working of more than one shift in any consecutive twenty-four hour period.

2. No remuneration other than as provided in this Supplemental Agreement shall be paid to drivers or motormen or trip riders designated by the operator to transport men to and from the mine bottom.

3. The provisions of paragraph numbered 1 hereof shall govern inside employees working at tonnage or piece rates, wherever such provisions are applicable to such workers.

The tonnage, yardage and deadwork rates shall be the existing tonnage, yardage and deadwork rates.

At each mine where men are paid on a tonnage or piece work basis, the operators and miners shall mutually determine the average travel time.

The rate per hour for travel time shall be computed for each individual tonnage or piece worker as follows:

(a) Add the total earnings during the first five days of each week for tons mined, yardage and deadwork.

(b) Divide this sum by a divisor established by subtracting the travel time for the number of days actually worked from eight and one-half times the number of days actually worked. This will establish the rate per hour for travel time.

(c) Multiply this rate per hour by the number of hours (including fractions thereof) that the individual traveled during the five day period, using the average travel time for each day he worked.

(d) The sum of (a) and (c) will constitute the employee's earnings for the week, except for overtime.

[fol. 187] (e) Work in excess of forty hours in the first five days of each week, and travel time for the sixth day, shall be paid for upon the basis of the average hourly earnings established over the five day period at time and one-half.

(f) Rate and one-half for the sixth day of work shall be computed as provided in the Supplemental Agreement providing for the six-day week.

4. The pushing of cars as a regular practice and except in cases of emergency shall be prohibited.

5. The Inside Day Wage Scale for able-bodied trappers, flaggers and switch-throwers (to answer telephone when required) (based on the eight and one-half hour work day) shall be not less than $7.29.

The inside Day Wage Scale for able-bodied greasers (based on the eight and one-half hour work day) shall be not less than $8.20.

6. The Outside Day Wage Scale for able-bodied slate pickers (based on the eight-hour work day) shall be not less than $7.29.

7. The provisions relating to vacations with pay are hereby amended to substitute, at the appropriate places therein, Fifty ($50.00) Dollars for Twenty ($20.00) Dollars.

In the interest of the National war effort, it is agreed that the vacation period shall be eliminated for the year 1943 without prejudice to or modification of the existing vacation clause of the Agreement. This arrangement shall in no wise affect the payment of Fifty ($50.00) Dollars to be paid by all operators to each individual in conformity with the terms of the Agreement.

The above payment to individual mine workers, entitled to vacation, shall be made at the option of the employing operator, except that in all cases full payment of the amount prescribed shall be made not later than the last pay day occurring in the month of June, 1943.

The vacation payment for the 1944 period shall be made on the last pay day occurring in the month of June of that year.

8. After the effective date of this Supplemental Agreement the operators shall furnish all mine workers' tools at the operators cost. At the option of each tonnage mine worker the operator shall purchase and the mine worker shall sell the tools the tonnage mine worker now owns at a price which is equal to one cent per ton for all coal mined by each tonnage mine worker between April 1, 1943 and the effective date of this Supplemental Agreement, with a minimum payment of $3.00.

Safety equipment and devices, including electric cap lamps, and also carbide lamps, shall be furnished by the operators without charge. This shall not include, however, personal wearing apparel such as hats, clothing, shoes and goggles. In lieu if furnishing carbide lamps and carbide the operator may at his option pay to the mine workers who use carbide lamps at their work 6 cents per day, and the mine workers shall continue to furnish their own carbide lamps and carbide.

[fol. 188] No charge shall be made for blacksmithing.

9. In the event of a dispute as to the starting time between any operator and the local union at any mine, either party may make a case on such dispute and therefore such case shall be handled in accordance with the provisions of the Agreement governing disputes.

10. If the United Mine Workers make a wage agreement during the period of this Supplemental Agreement, covering wages or working conditions with any person, corporation, association or district, more favorable to the operators than as contained herein, then this Supplemental Agreement shall be modified so that the operators who are parties hereto shall receive all of the benefits of such more favorable agreement.

For the duration of this Supplemental Agreement no strikes shall be either called or maintained hereunder.

11. The operators agree that they will not lease any operating mines subject to this Supplemental Agreement as a subterfuge for the purpose of avoiding the provisions of this Supplemental Agreement.

12. It is agreed that the operators who are parties hereto shall be parties to and participate in the conferences to negotiate the basic wage agreement to be effective after March 31, 1945.

13. There shall be paid to each employee on the pay roll of the employer from April 1, 1943 to June 20, 1943, as his distributive share of and in full of, and all amounts due for portal to portal since April 1, 1943, the sum of Forty ($40.00) Dollars payable in equal installments during the four months commencing on the first day of the calendar month following the effective date of this Supplemental Agreement. Any employee on the pay roll during said period for a time less than the full said period shall be paid a corresponding pro rata share of such Forty ($40.00) Dollars.

14. The payments herein provided for shall be construed to be in full settlement and discharge of all portal to portal compensation accruing prior to April 1, 1945, and in settlement and discharge of all pending litigation by the mine workers against the operators and by the operators against the mine workers signatory hereto for such portal to portal compensation. In consideration of such acceptance and discharge the operators and mine workers signatory hereto agree that all actions at law and suits in equity hereto instituted by them involving the question of portal to portal compensation shall be dismissed. This paragraph shall be without prejudice to any right of any party signatory to this Supplemental Agreement arising after April 1, 1945.

15. This Supplemental Agreement, as to general wage rates, may, on thirty (30) days' notice from either party, be reopened for negotiation at the end of the first contract year. The foregoing sentence shall not preclude the parties from mutually agreeing at any time during the term of this Supplemental Agreement, on changes in general wage rates, subject to such approval by the appropriate governmental agencies as may be required by the Act of Congress of October 2, 1942, and the Executive Orders and [fol. 189] Regulations issued thereunder. Furthermore, if at any time during the term of this Supplemental Agreement a significant change occurs in the government wage policy, either party shall have the right to request negotiations on general wage rates.

16. This Supplemental Agreement is an integrated instrument and its respective provisions are interdependent, and shall be in effect only after the approval hereof by the appropriate governmental agencies and after the granting by the Office of Price Administration of advances in maximum prices sufficient to cover the increased costs occasioned hereby.

Executed in triplicate in the City of Washington, D. C. the Twenty-third day of September, 1943.

Illinois Coal Operators Association, By (S.) George F. Campbell, President, Fred S. Wilkey, Secretary, D. W. Buchanan, Hubert E. Howard, William P. Young, D. H. Deavonald, H. A. Treadwell, Sub-Scale Committee. District No. 12, United Mine Workers of America, By (S.) Ray Edmundson, President, Hugh White, Vice President, Walter J. James, Secretary-Treasurer, Walter C. Jenkins, John H. Jones, Charles Brosch, Sub-Scale Committee. United Mine Workers of America, International Union, By (S.) John L. Lewis, President, John O'Leary, Vice President, Thomas Kennedy, Secretary-Treasurer.

[fol. 190] PLAINTIFF'S EXHIBIT No. 40-a

National War Labor Board

October 26, 1943.

Case No. 13-279 (Request for Approval of an Agreement)

In the Matter of ILLINOIS COAL OPERATORS ASSOCIATION and United Mine Workers of America and District 12, United Mine Workers of America

DECISION

The Illinois Agreement now submitted to the Board presents for the first time a true portal-to-portal method of compensation for the mine workers. The 1941-1943 contract provides for a 7 hour day and 35 hour week of productive time at the working face, *excluding* travel time. The Board has already approved its extension to an eight hour day and 48 hour week with time and one-half for all productive time by 7 hours a day or 35 hours a week. The Illinois Agreement proposes to substitute for this method a compensation an 8½ hour day *inclusive* of travel time, with payment at straight time rates for the 8½ hours and overtime payment at rate and one-half for all time beyond 40 hours a week.

As we said in our opinion of August 24 on the previously submitted Illinois Agreement "In acting upon such an agreement the powers and duties of the National War Labor Board are strictly limited. We have authority to pass only upon the wage items of the agreement, and to disapprove them only if they are inconsistent with the national wage stabilization policy. The principles and yardsticks of that policy are set forth in Executive Order #9250 of October 3, 1942, Executive Order #9528 of April 8, 1943 and the Supplemental Policy Directive of May 12, 1943, all issued under the provisions of the Act of Congress of October 2, 1942."

The Board can therefore approve the basic principle of the Illinois Agreement now presented to it, that is, the principle of establishing a method of payment on an 8½ hour day including travel time, in place of the old 7 hour day excluding travel time. But the Act of Congress and the Executive Orders and Directive issued thereunder require that the Board should pass upon the *amount* of compensation

under the new plan to determine whether it includes a wage increase beyond the limits of the wage stabilization policy.

The studies of the Bureau of Labor Statistics for the years 1931, 1933 and 1936 indicate that the average travel time in the Illinois underground mines is between 0.7 and 0.8 of an hour, although both the mine workers and the operators have stated (without, however, submitting any supporting data) that the average travel time exceeds this amount. To make possible an immediate contract, the Board is willing to assume that in the Illinois underground mines covered by the proposed agreement the average travel time is 0.75 hours or 45 minutes per day. We are willing to do this even though the present travel time may somewhat exceed this amount because we are convinced that when travel time is paid for the economic inducement imposed on the operators will lead them to reduce the travel time, and because the mine workers have, in their submis- [fol. 191] sion of the proposed Illinois Agreement, expressed their willingness to have the operators reduce the travel time as much as they can if adequate facilities are provided in connection with any newly opened portals.

On this assumption of 45 minutes average travel time per day the productive time in the 8½ hour day would amount to 7 and three-fourths hours. Under the old contract the compensation for this amount of productive time would be 8.125 times the hourly rate (straight time for 7 hours and time and one-half for 45 minutes). On the base rate of $1.00 an hour this would amount to $8.12½. The new Illinois Agreement proposes to pay for the 8½ hours, including travel time, a base rate of $8.50. This is a daily wage increase of 37½ cents and is therefore 37½ cents a day more than the Board is able to approve under the limitations of the Act of Congress and the Executive Orders and Directive issued pursuant thereto.

The Board could approve a daily wage of $8.12½ but not more.

When we turn to the overtime provisions of the proposed Illinois Agreement, we find that they follow the statutory provisions of the Fair Labor Standards Act. For mine workers who work more than 40 hours a week this involves a wage increase of half time for 2½ hours of the fifth day of work, but under any true portal-to-portal system in which travel time is included in working time this result follows

as a matter of law from the Fair Labor Standards Act. It is, in the present case, the amount that the operators have to pay to relieve themselves of any further liability under the Fair Labor Standards Act. We have already held that payments made to satisfy the requirements of that Act, if they are truly related to those requirements, may be approved. The provision of the proposed Illinois Agreement as to overtime are exactly fitted to the Fair Labor Standards Act and we can therefore approve them.

For outside employees (including strip mine and coke oven employees) the proposed Illinois Agreement provides for an 8 hour day with time and one-half for the eight hours. This follows the 8 hour day provision that has already been approved in connection with the old contract. For outside employees such as maintenance employees whose normal work day heretofore has been 8 hours the Illinois Agreement provides for a work day of 8 hours and 20 minutes at straight time for the first 8 hours, and time and one-half for the last 20 minutes. This is a reasonable adjustment to maintain relative relationships among the different classes of employees, and it can be approved.

The total effect of what we can approve amounts to a very substantial increase of the mine workers' weekly wage so long as the miners work more than 40 hours a week. Figured on the basic hourly rate of $1.00, the total weekly earnings of the mine workers under the Illinois Agreement modified to reduce the basic daily wage from $8.50 to $8.12½ would be increased over the 1941-1943 Agreement by approximately $10.00 per week from about $45.50 to about $55.50 per week. The total weekly hours for a six day week including travel time would be 51 hours (46½ hours productive time and 4½ hours travel time) compared with 42 hours productive time under the 1941-1943 Agreement. The wage increase of approximately 25 cents a day [fol. 192] as resulted from the wage adjustment heretofore approved by the War Labor Board for the bituminous coal miners is included in these figures. The actual average earnings are about 8 to 10 per cent above these earnings figured on the basic rate because most miners get a higher hourly rate than the base rate. For a miner who worked six days a week the average weekly earning would be approximately $60.00.

The beneficial effects of such a contract would be to make available to the mine workers a considerable amount of

overtime thereby making fuller use of the limited available manpower, increasing the weekly earnings of the miners, increasing the production of bituminous coal which the country so badly needs, and disposing of the portal-to-portal controversy. This would be accomplished by applying to the mine workers' wages the same yardsticks that have been used in measuring wage adjustments for all other wage earners without discriminatory advantage or disadvantage, and without unstabilizing general wage levels.

All the other provisions of the proposed Illinois Agreement relating to wages merely embody wage adjustments which the Board has already approved except the provision of paragraph thirteen that the sum of forty dollars will be paid to each mine worker on the payroll from April 1, 1943 to June 20, 1943 as a retroactive adjustment and in full settlement and discharge of all accrued portal-to-portal compensation. We think this amount represents a reasonable settlement and we can approve it.

The other provisions of the proposed Agreement, which do not involve wage adjustments, do not require our approval.

Furthermore, if and when the operators and the mine workers do, in cooperation succeed in reducing the average travel time for all the mines covered by the Agreement below 45 minutes a day, and simultaneously increasing the productive working time at the face, a contract could be approved allowing the miners a further increase in their daily wage. If the average travel time can thus be reduced to 30 minutes a day, the mine workers could be paid the full amount of the proposed Illinois Agreement. If the Illinois Agreement is modified as above indicated it will be approved by the War Labor Board.

Representing the Public: (S.) William H. Davis, George W. Taylor, Wayne L. Morse, Frank P. Graham. Representing Industry: (S.) George H. Mead, George K. Batt, Horace B. Horton.

Dissenting:

Representing Industry: (S.) Almon E. Roth. Representing Labor: (S.) George Meany, Robert J. Watt, Van A. Bittner, John Brophy.

[fol. 193] Advance Release Advance Release

Office of War Information, National War Labor Board

B-1069

For Release in A. M. Papers of Friday, October 29, 1943.

A dissenting opinion in the Illinois Coal case, signed by the American Federation of Labor members of the National War Labor Board, was made public today.

The opinion is attached.

[fol. 194] National War Labor Board

Case No. 13-279

In the Matter of Illinois Coal Operators Association and United Mine Workers of America and District 2, United Mine Workers of America

October 28, 1943.

(Request for Approval of an Agreement)

Dissenting Opinion of Labor Members

The Labor Members dissent from the position taken by the majority, because they believe there is one basic principle about which there can be no compromise: the workers should be paid for the work they do. The opinion of the majority on the portal-to-portal issue is a compromise of this principle.

The Labor Members see no reason for the mental, legal and arithmetical gymnastics indulged in by both divisions of the majority. Starting from the same premise that travel time is *work* time, and, therefore, compensable, the Labor Members accept the "test" proposed by the majority:

> "Does the proposed wage result in the workers' receiving more money for the same amount of work?"

The answer to this question is definitely "no" if the Illinois Agreement were approved in full. The logic of the Illinois Agreement is clear. All travel time is work time. All work time is "productive" time. The miners are to work 8½ hours per day. Within the first 40 hours of the

week each hour worked is to be paid for at the base rate of $1.00 per hour. Each hour worked in excess of 40 hours is to be paid for at one and one-half the base rate. For the 51 hour work-week they are entitled to receive $56.50.

The facts in this case related to the portal-to-portal issue are clear. Guided by a previous decision of the Board, the two parties in this case—The Illinois Coal Operators Association and the United Mine Workers of America—successfully bargained collectively and arrived at an agreement which included a genuine portal-to-portal method of compensation for the mine workers.

In this Agreement, the parties have jointly proposed that the historical work day of 7 hours be lengthened to 8½ hours, and that the former 35 hours be increased to a 51 hour week. The new work day was to include travel time. Finally, it was agreed that overtime was to be paid for all hours in excess of 40 hours per week at the rate of time and one-half.

In terms of dollars and cents, the Agreement meant that instead of earning $1.00 per hour for 7 hours per day, the miners would now earn $8.50 for an 8½ hour day at [fol. 195] straight time. The increase in daily earnings would be commensurate with an increase of 1½ hours more work per day.

A majority of the Board has seen fit to deny this wage adjustment, not because they do not believe the method of determining portal-to-portal pay is not genuine; not because they do not believe that travel time is not work time; but they have rejected this Agreement because they do believe that travel time should not be paid in full.

There is apparent unanimity among the majority that travel time is work time. Specifically, the statement is made that the Board recognizes that the *method* of determining portal-to-portal compensation is genuine and that the Board has, therefore, only to pass upon the *amount* of compensation to be paid. Precisely how the amount is determined is a point of difference between not only the majority and the minority of the Board in this case, but also between the members of the majority.

In the majority decision, as described by Chairman Davis, the determination of the daily pay for 8½ hours at straight time raises the question of how much per day is paid for the three-fourths of an hour of travel time. If the former basic hourly rate of $1.00 per hour is continued in this contract,

then travel time within the statutory 40 hour week is paid for at half time. (7-three-fourth's time at $1.00 per hour and three-fourths of an hour at half time). If the three-fourth's of an hour daily travel time is paid for at a full straight time rate, then the miners have had their basic hourly rate reduced from $1.00 per hour to approximately 95½ cents per hour.

In a special concurring opinion some members of the majority are more specific in their answer to the question of how much pay is granted for travel time within the 40 hour straight time period. The position taken by these members of the majority is that no pay is to be granted for the travel time which occurs within the first 40 hours worked. Travel time will be paid for only after 40 hours have been worked, and then at the time and one-half rate.

In both the majority opinion and in the special concurring opinion there is unanimity on the point that travel time is work time. There is, however, a difference in the explanations of just when travel time is paid. In the majority opinion, there is no forthright explanation of when travel time is paid for; the bald statement is made that $8.12½ is to be paid for 8½ hours at straight time per day for hours worked within the 40 hour period. All hours in excess of 40 are compensated for at a time and one-half period. All hours in excess of 40 are compensated for at a time and one-half rate. Precisely how travel time is paid for is left to the reader's mathematical approach.

In the special concurring opinion, by way of contrast, travel time is definitely not paid for if it is worked during the first 40 hours of the week.

It is our considered judgment that the miners should receive $8.50 for each straight time 8½ hour day worked. [fol. 196] For the work-week of 40 hours at straight time and 11 hours at time and one-half the total take-home should be $56.50.

Neither of the two divisions of the majority group are willing to concede that in dollars and cents travel time is genuinely work or productive time. By limiting the amount of the daily earnings to a total of $8.12½ for hours worked within the 40 hour period, the majority opinion essentially limits travel time to half time pay. The special concurring opinion does not pay for this productive time at all until

after 40 hours have been worked on the legal ground that the Fair Labor Standards Act does not require it. Then time and one-half pay is paid for travel time.

The inability of both divisions of the majority to conceile that travel time is productive time that should be paid for in full whenever it is worked contravenes the basic principle that pay is due for *all* time worked. The Labor Members are forced to dissent also because the rights of the workers to full pay cannot be explained away by half-time pay or the limitations of legal requirements.

This decision of the majority adds another to the list of decisions of this Board which have been determined not on the basis of merit, but rather by the attitude of the individuals and government agencies who dominate the actions of the public members of the Board.

George Meany, Mathew Woll, Robert J. Watt, Martin P. Durkin.

[fol. 197] PLAINTIFF'S EXHIBIT No. 41

Memorandum of Agreement

On November 1, 1943, the Secretary of the Interior, pursuant to the direction of the President, took possession of the coal mines at which a strike or stoppage had occurred or was threatened. The order of the President authorized and directed the Secretary to offer to the mine workers a contract governing the terms and conditions of employment for the period of the National War Labor Board, in the matter of Illinois Coal Operators Association and United Mine Workers of America of October 26, 1943, and with such further directives as may be given by the War Labor Board. It further required the Secretary to submit the contract to the Board for its approval.

The mining of coal for war must be resumed immediately. In order to accomplish this, the parties have reached a tentative agreement in accordance with the opinion of the War Labor Board. This agreement provides for the relinquishment of the mine workers of 15 minutes out of the customary 30-minutes lunch period. The utilization of this 15-minute period for productive work will yield an estimated additional annual tonnage of coal in excess of 20,000,000 tons of bituminous and 2,000,000 tons of anthracite.

The following agreement is therefore made:

A. In respect to bituminous mines:

1. All of the provisions of the Illinois contract which were not disapproved by the War Labor Board in its decision of October 26, 1943, shall become effective at the time stated in this agreement, provided, however, that the provisions of Paragraph 13 of the Illinois contract shall not be applicable to the Government.

2. In applying the opinion of the War Labor Board to the areas other than the Illinois area, the parties have assumed an average travel time throughout the areas of 45 minutes per day in accordance with the assumption by the War Labor Board in the Illinois case. This assumption is made solely for the purposes of this agreement and is limited thereto.

3. The prevailing customary 30-minute lunch period is hereby reduced to 15 minutes and the mine workers agree to work said additional 15 minutes as productive time and shall be paid therefor on the basis of time and one-half or rate and one-half, as the case may be, and be made applicable to all existing rates effective in all bituminous coal districts. Using the Illinois basic rates purely for illustration, this is intended to provide a basic daily wage in that area of $8.50 a day.

B. In respect to anthracite mines:

1. All of the provisions of the agreement approved by the War Labor Board in its directive order of October 28, 1943, in the Matter of the Anthracite Operators and the [fol. 198] United Mine Workers of America District Nos. 1-7 and 9 *and* hereby made a part of this agreement.

2. The prevailing customary 30-minute lunch period is hereby reduced to 15 minutes and the mine workers agree to work said additional 15 minutes as productive time and shall be paid therefor, on the basis of time and one-half for each day worked. This is intended to provide, in addition to the increase approved in the War Labor Board order of October 28, an increase of 37.8 cents per day for all day and monthly men. All contract miners, consideration miners and contract mine laborers will receive an increase of 37.8 cents per start. The proportion of the proper share of the

increase for this 15-minute additional productive work in respect to contract mine laborers is to be paid by the operator in accordance with established custom and practice.

C. In respect to both bituminous and anthracite mines:

1. This agreement is to cover all of the possessed coal mines which had contracts with the United Mine Workers of America for a period ending during the year 1943.

2. It is expressly affirmed that both parties will take all appropriate steps to assure maximum safety in working conditions and will cooperate to that end.

3. This agreement shall promptly be submitted, in accordance with the direction of the President, to the National War Labor Board for its approval. Subject to that approval, this agreement becomes effective today.

(Signed) Harold L. Ickes, Secretary of the Interior;
(Signed) John L. Lewis, President United Mine Workers of America.

November 3, 1943, Washington, D. C.

[fol. 199] PLAINTIFF'S EXHIBIT No. 41-a

November 5, 1943.

In the Matter of Memorandum of Agreement Between the Secretary of the Interior and the United Mine Workers of America

Resolution

The National War Labor Board, acting on the authority vested in it by Executive Order No. 9017 of January 12, 1942; the Executive Orders, Directives and Regulations issued under the Act of Congress of October 2, 1942, and the War Labor Disputes Act of June 25, 1943, hereby resolves as follows:

(1) That the Memorandum of Agreement reached by the Secretary of the Interior and the United Mine Workers governing the terms and conditions of employment for the period of the operation of the coal mines by the Government is hereby approved, subject to clarification and resubmission as to (a) the provisions for payment of ton-

nage or piece workers and (b) the application of the provisions as to the pushing of cars in places where it is impracticable to deliver the cars to the working place other than by pushing.

(2) That the President of the United States be notified of this approval in accordance with the provisions of Section 5 of the War Labor Disputes Act.

(3) That the fact of such approval and notification be transmitted to the Secretary of the Interior with the covering letter which has been prepared by the Chairman and submitted to the Board and is attached hereto.

Representing the Public: William H. Davis, Chairman; George W. Taylor, Frank P. Graham.

Representing Labor: George Meany, Robert J. Watt, Van A. Bittner, Carl Shipley.

Representing Industry: George Mead, Reuben B. Robertson, James Tanham, Walter Margetts.

Dissenting: Wayne L. Morse.

[fol. 200] PLAINTIFF'S EXHIBIT No. 41-b

National War Labor Board

November 5, 1943.

In the Matter of:

Proposed Memorandum of Agreement Governing Wages in Coal Mines During Period of Government Operation

Dissenting Opinion

The Memorandum of Agreement submitted by the Secretary of the Interior to the War Labor Board for its approval in this case is the end result of four costly strikes by the United Mine Workers of America in violation of the no-strike pledge. It is the product of coercive action resulting from the exercise of economic power against the Government and the people of the Nation. The language of the Agreement contains its own admission of this fact when it states, "The mining of coal for war must be resumed immediately. In order to accomplish this, the parties have reached a tentative agreement in accordance with the Opinion of the War Labor Board." It is contrary to sound

public policy for the War Labor Board to approve this agreement which was negotiated under the duress of a strike.

The War Labor Board has consistently ruled, up to now, that it will not consider the merits of a controversy between an employer and a union while a strike is in progress. This Memorandum of Agreement was not only negotiated in the midst of strike action, but the War Labor Board has reached a decision on it while many thousands of miners are still engaged in a work shortage. The Nation should have exercised its sovereign power to meet the challenge raised by the economic action of the United Mine Workers of America, rather than capitulate to that challenge by offering them a contract which appears to have been dictated at the point of the strike weapon.

There is not any language in the President's Executive Order of November 1, 1943, which supports the position of those who argue that the Secretary of the Interior was authorized to offer the mine workers a contract while they were still out on strike. To the contrary, the Order when read in its entirety and in connection with the President's statement issued at the time the Order was released, leaves no room for doubt about the fact that he ordered the mines seized under the War Labor Disputes Act. Furt-er, he stated, "The mines will be opened by the Government on Wednesday morning. Every miner will be expected to be at his post of duty, ready to work for his Government." The return of the men to work should have been a condition precedent to any offer of a contract by the Secretary of Interior or any consideration of such a contract by the War Labor Board if the purpose and intent of the statements of the President and the provisions of his Executive Order were to be observed.

The most serious consequence to the stability of wartime labor relations may be expected to flow from this abrogation of the previous policy of the Government by those actions of the Secretary of Interior and of the War Labor Board in this case. The example set is bound to influence [fol. 201] the conduct of other irresponsible labor leaders and undermine the disciplinary control of patriotic and responsible labor leaders who believe that their members should live up to the no-strike pledge. Already, the War Labor Board has been notified by one of its regional boards

that two serious strikes in vital war plants have been called by union leaders who are insisting that the striking men will not return to work until the Government, through the War Labor Board, approves a settlement in the same manner as that in which the Government capitulated to the demands of the United Mine Workers of America.

The contract for the Illinois coal area previously passed upon by the Board differs in its inherent nature from the contract proposed in the instant case. Sight must not be lost of the fact that the proposed Illinois contract was the outgrowth of collective bargaining between the Mine Workers and the mine owners. It set forth terms mutually satisfactory to the workers and owners of the mines. The contract proposed in the instant case is not a collective-bargaining contract. Its legal status is an anomaly. However, it does purport to set forth the terms of a wage agreement which is to prevail in all of the areas. It is to be applied to the private property of citizens who were not parties to the contract. It is true that the contract supposedly is to govern for only the period of time during which the mines are operated by the Government, but it is a virtual certainty that the mine owners will have to accept a contract embodying the same conditions when their mines are returned to them or be faced with strike action. The mine owners best of all know this to be a fact. They had no voice in determining the terms of the contract, yet their property interests are vitally affected thereby. Private property interests throughout the country have the right to be concerned and alarmed over such a procedure.

The proposed contract cannot be reconciled with the Illinois contracts because it rests upon the unproved assumption that the average travel time in the mines outside of Illinois is 45 minutes. Records made at hearings before the War Labor Board since the coal controversy first started show that the mine owners in the Appalachian fields and in Alabama contest that assumption. The Appalachian operators claim that the average travel time is approximately 82 minutes. It is interesting to note at this point that spokesmen for the United Mine Workers of America, including its International President, claimed some weeks ago that 90 minutes was the average time in the Appalachian fields.

The War Labor Board has no right to assume that 45 minutes is the average time as long as the owners outside

of the Illinois area are in such complete disagreement with the assumption.

The Board's assumption is bound to work a great hardship upon the owners of those mines in the Appalachian and Alabama fields in which the travel time is much in excess of 45 minutes. It is one thing in the Illinois case to make the 45-minute travel-time assumption because it was agreeable to the owners and the union, but it is not fair or equitable to make it applicable to mine owners in other fields who have [fol. 202] insisted that any such assumption would be contrary to fact and, therefore, would work great financial hardship upon them. It is well recognized that the percentage of mines in the Appalachian fields with a travel time well over one hour is greater than in the Illinois area. At the hearing on the Illinois contract, the Appalachian owners contended that unless the Government supplied them with a supporting price to meet the added cost, the 45-minute travel-time assumption would make it impossible for them to operate even under the favorable market conditions of wartime and would most certainly put them out of business in peacetime. Property interests and rights of citizens should not be adjudicated by a Government upon the basis of unproved promises and assumptions and without affording all those affected an opportunity to participate in the negotiations of any settlement such as this one.

The proposal to decrease the 30-minute lunch period to 15 minutes in order to satisfy on paper Mr. Lewis' demand for an $8.50-per-day wage as a condition for mining coal cannot be challenged from a mathematical standpoint. However, it is very doubtful that any such increase of productive time at the expense of the lunch-rest period will be a causative factor in producing more coal. The arduousness of the work of miners would seem to justify providing them with the necessary rest incident to a 30-minute lunch period. Practically all studies on industrial fatigue reach the conclusion that workers engaged in such heavy work as that of mining can produce just so much in a given day and when the hours are increased beyond the point of maximum efficiency or reasonable rest periods are denied the workers' production usually falls off.

Over the years, the officials of the United Mine Workers of America have argued and demonstrated convincingly that long hours at the working places in the mines result in less coal production than a day of shorter hours with a 30-

minute lunch period. The Government should not be a party to reducing the miners' lunch period in order to justify yielding to the demand in an increase in earnings. If it was necessary, to meet Mr. Lewis' $8.50-per-day wage demand in order to get coal mined, then it would have been fairer and more forthright to make an exception to the wage stabilization program to the extent of paying the miners the sum demanded and let them keep their 30-minute lunch period.

By way of summary, this dissent rests upon the following findings:

First. The contract is the product of the use of economic action against the Government and the Nation, and, therefore, should be disapproved as being against sound public policy.

Second. It violates the heretofore policy of the Government that wartime labor disputes will not be adjudicated and determined by the Government during a strike, but that strike-s should first be required to return to work.

Third. The procedure followed in negotiating this contract and submitting it to the War Labor Board for approval, and the approving of the contract by the Board, subject to certain minor corrections, is not in accordance [fol. 203] with a fair and reasonable interpretation of the President's Executive Order of November 1 and his statement to the public released therewith.

Fourth. The example set by the procedure adopted in this case is likely to cause serious interruption of production in any other industry in which there may be irresponsible union officials who are not loyal to their no-strike pledge.

Fifth. The contract jeopardizes private property interests because in all probability the owners of the mines will have to accept its terms, if and when their mines are returned to them, or be faced with strike action. The record indicates that many of them cannot operate their mines without a substantial Government subsidy because travel time in their mines is far in excess of the assumed 45-minutes.

Sixth. The contract proposes to reduce the lunch period of 30-minutes to 15-minutes as a device for increasing the productive time of the miners, thereby providing on paper the additional amount of earnings necessary to meet the

$8.50-per-day wage demand. It is very doubtful that taking a needed rest period away from the miners will in and of itself produce more coal or promote their efficiency and well being.

Seventh. Lastly, The negotiating and submitting of the contract to the War Labor Board and its approval thereof in light of all the surrounding facts and circumstances place a great strain on the ordinary conception of Government by law.

The majority of the Board have spoken. This writer highly respects their views, but for the foregoing reasons he dissents from their decision.

Opinion by: Wayne L. Morse.

[fol. 204] PLAINTIFF'S EXHIBIT No. 42

National War Labor Board
Washington, D. C.

November 5, 1943.

Honorable Harold L. Ickes, Secretary of the Interior,
Washington, D. C.

MY DEAR MR. SECRETARY:

This will acknowledge yours of November 3 applying to the National War Labor Board, in accordance with Executive Order 9393 and pursuant to Section 5 of the War Labor Disputes Act, for approval of the memorandum of agreement governing the terms and conditions of employment for the period of the operations of the coal mines by the government.

I am today transmitting to the President, in accordance with the provisions of Section 5 of the War Labor Disputes Act, the War Labor Board's approval of the memorandum of agreement in principle, but subject to clarification and resubmission as to (1) the provisions for payment of tonnage or piece workers, and (2) the application of the provision as to the pushing of cars in places where it is impracticable to deliver the cars to the working place otherwise than by pushing. Any approval of this agreement for the period of the operation of the coal mines by

the government is, of course, subject to the provisions of Section 5 of the War Labor Disputes Act as to subsequent modification.

The Board has approved the principles of the submitted agreement as applied to employees working on a day wage basis because of the fact that it provides no more pay for the work performed in a forty hour week than would be due to the miners for that same work under the 1941-1943 agreement. The submitted agreement provides on the average for eight full hours of productive work in each eight and one-half hour working day with daily compensation to the workers up to forty hours a week in the same amount they would be compensated under the 1941-1943 agreement, with compensation at one and one-half times the hourly rate for all hours over forty including travel time, in accordance with the applicable provisions of the Fair Labor Standards Act.

The provisions as to tonnage workers do not clearly reflect this same principle. To make the same principle effective the travel time rate for tonnage workers should apparently be but two-thirds of that specified in the Illinois Agreement.

Paragraph 4 of the Illinois Agreement provides that "The pushing of cars as a regular practice and except in cases of emergency shall be prohibited." This was agreed to for the Illinois area by the Illinois operators and mine workers. Your attention is called, however, to the fact that in the Directive Orders of the Board of May 25, 1943 and June 18, 1943 in the dispute between the Appalachian Operators and the United Mine Workers the Board, in connection [fol. 205] with this matter of "Spotting of cars" found that there are cases in which it is not possible to deliver the mine cars to the working places other than by pushing. The Board ruled that the cars should be so delivered "so far as practicable" and required the parties to refer the question of pushing the cars to district conferences. It should, therefore, be understood and agreed that, outside of the Illinois area, paragraph 4 of the Illinois Agreement, during the period of government operation, will be subject to the Directive Orders of the Board of May 25, 1943 and June 18, 1943 so that the delivery of cars to the working places by pushing will be the subject of local negotiations and will not be prohibited where it is impracticable otherwise to deliver them to the working places.

It seems to the Board that paragraphs 12 and 15 and part of 14 of the Illinois Agreement are not applicable to government operation and should be excluded.

This is obviously true of paragraph 12 which deals only with the matter of what operators shall be parties to the future negotiation of a basic wage agreement between mine workers and operators to be effective after March 31, 1945.

As to paragraph 14, the Board thinks that all of it should be omitted except the following words:

"14. The payments herein provided for shall be construed to be in full settlement and discharge of all portal to portal compensation."

The remainder of the paragraph has to do with the settlement of pending claims and lawsuits between the mine workers and the operators and seems to be no proper part of the agreement with the government.

We think paragraph 15 of the Illinois Agreement should be excluded for the reason that it was intended to fix the term or duration of the agreement between the mine workers and the operators, whereas the duration of the agreement you submit to us is "for the period of the operation of the coal mines by the government."

In connection with your use of 45 minutes as an average of travel time in the agreement covering all the mines during the period of government operation, I am requested by the Board to call your attention to the fact that the Board's approval of this average for the Illinois Agreement, even though travel time may somewhat exceed that amount, was based upon two important considerations; (1) that the economic inducement imposed on the operators would lead them to reduce the travel time; and (2) that the mine workers in their submission of the proposed Illinois Agreement expressed to the Board their willingness to cooperate in reducing the travel time as much as possible, if adequate facilities were provided in connection with any newly opened portals. In approving this average for all the mines during the period of government operation the Board assumes that this reduction of travel time will in no way be impeded, and hopes that it will be in every way accentuated. [fol. 206] The Board is very definitely of the opinion in the approval of any agreement that may be made between the operators and the Mine Workers of the Board should have more exact information as to the actual travel time,

and also a concrete estimate of the possibilities of reducing travel time in the several contract areas and it certainly would be desirable to have that information broken down for the mining districts and for the price areas. The existing possibility of reducing the amount of travel time can justify an assumption of average travel time somewhat greater than the actual amount of travel time. With the more exact information the parties and the Board would be in a position to determine whether the assumed average is reasonably within the principle of the Board's decision, i. e. that the wages paid for the first forty hours of the week should not exceed the wages that would be paid under the 1941-1943 agreement.

If you feel that the prompt resubmission of the agreement would be facilitated by a personal conference between us, please let me know.

Sincerely yours, (S.) William H. Davis, Chairman.

[fol. 207] PLAINTIFF'S EXHIBIT No. 43

Copy of memorandum from K. C. Adams, U. M. W. A., to J. D. Battle, dated November 9, 1943. Mr. Adams says this is their interpretation.

Each and every coal company which had an agreement with the U. M. W. A. in the period 1941-1943 and worked under the continuing terms of this contract, as amended by the W. L. B., up to October 31, 1943, is liable for the $40 back "portal-to-portal" payment, payable in four equal installments following the first day of the calendar month following the effective date of the U. S.-U. M. W. A. agreement.

The U. S.-U. M. W. A. agreement became effective November 3, 1943. This agreement continues in effect the basic agreement of 1941-1943, the supplemental six-day agreement, the directives of the W. L. B. affecting free tools, blacksmithing and cap lamps, the increased vacation pay from $20 to $50, and all of the terms and conditions of the Ill.-U. M. W. A. supplemental agreement, which are made applicable to all bituminous coal areas before mentioned as having contract relationship with the U. M. W. A., with the exception of:

(1) Car Pushing—which is referred to local settlement

(2) Application of Computing Tonnage Rate Payments—which is left for further clarification between the U. M. W. A., the U. S. Government and the W. L. B.

In the decision of the W. L. B. of October 26, the Board said:

> "All the other provisions of the proposed Illinois Agreement relating to wages merely embody wage adjustments which the Board has already approved except the provision of paragraph 13 that the sum of $40 will be paid to each mine worker on the payroll from April 1, 1943, to June 20, 1943, as a retroactive adjustment and in full settlement and discharge of all accrued portal-to-portal compensation. We think this amount represents a reasonable settlement and we can approve it."

Nothing could be plainer. The mere fact that the Government took over the mines does not relieve the operators of their responsibility of the $40 compromise payment for the back portal time.

The U. S.-U. M. W. A. contract now in force is a combination of the application of the basic agreement, 1941-1943, the supplemental six-day work agreement, the authorizations of the W. L. B. and the Ill.-U. M. W. A. supplemental agreement.

Section I of the U. S.-U. M. W. A. contract merely relieves the Government from immediate payment out of Government funds for "portal-to-portal" back pay as provided in Paragraph 13 of the Ill.-U. M. W. A. agreement.

[fol. 208] PLAINTIFF'S EXHIBIT No. 44

Executive Order

Possession and Operation of Coal Mines

Whereas widespread stoppages have occurred in the coal industry and strikes are threatened which will obstruct the effective prosecution of the war by curtailing vitally needed production in the coal mines directly affecting the countless war industries and transportation systems dependent upon such mines; and

Whereas it has become necessary for the effective prosecution of the war that the coal mines in which stoppages or strikes have occurred, or are threatened, be taken over by the Government of the United States in order to protect the interests of the nation at war and the right of workers to continue at work:

Now, Therefore, by virtue of the authority vested in me by the Constitution and laws of the United States particularly the War Labor Disputes Act (Public Law 89, 78th Congress), as President of the United States and Commander-in-Chief of the Army and Navy, it is hereby ordered as follows:

The Secretary of the Interior is authorized and directed to take immediate possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened, together with any and all real and personal property, franchises, rights, facilities, funds and other assets used in connection with the operation of such mines, and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war, and to do all things necessary for or incidental to the production, sale and distribution of coal.

In carrying out this order, the Secretary of the Interior shall act through or with the aid of such public or private instrumentalities or persons as he may designate. He shall permit the management to continue its managerial functions to the maximum degree possible consistent with the aims of this order.

The Secretary of the Interior shall make employment available and provide protection to all employees in resuming work at such mines and to all persons seeking employment so far as they may be needed; and upon the request of the Secretary of the Interior, the Secretary of War shall take such action, if any, as he may deem necessary or desirable to provide protection to all such persons and mines.

The Secretary of the Interior is authorized and directed to maintain customary working conditions in the mines and customary procedure for the adjustment of workers' grievances. He shall recognize the right of the workers to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protec-

tion, provided that such concerted activities do not interfere with the operations of the mines.

[fol. 209] The Secretary of the Interior is further authorized and directed to offer to the duly constituted representatives of the workers' own choosing a contract or contracts governing the terms and conditions of employment for the period of the operation of the mines by the government, in accordance with the opinion of the National War Labor Board in the matter of Illinois Coal Operators Association and United Mine Workers of America of October 26, 1943, and with such further directives as may be given by the War Labor Board. When any such contract has been agreed upon, the Secretary of the Interior shall apply under Section 5 of the War Labor Disputes Act to the National War Labor Board for the approval of such contract and such changes in the terms and conditions of employment as may be authorized therein.

Possession and operation of any mine or mines hereunder shall be terminated by the Secretary of the Interior as soon as he determines that possession and operation hereunder are no longer required for the furtherance of the war program, but in no event more than sixty days after the restoration of the productive efficiency thereof prevailing prior to the taking possession thereof.

Nothing in this order shall be construed to repeal or amend Executive Order No. 9370 dated August 16, 1943, authorizing the Economic Stabilization Director to take certain action in connection with the enforcement of directives of the National War Labor Board.

Franklin D. Roosevelt.

The White House, November 1, 1943.

[fol. 210] PLAINTIFF'S EXHIBIT No. 45

List of Compensible Man Trip Accidents

1939

Mike Underwood, Loader, age 22, was injured at No. 2 Mine 10-26-39. Man trip ran away and bumped rear of trip of loads. Laceration lip and cracked tooth. Returned to work 11-6-39, time lost 10 days. Compensation cost $33.52 (dental bill). Foreman, G. V. Olive.

Mathias Wingo, Trackman, age 38, was injured at No. 1 Mine 6-20-39. Man trip motor collided with haulage motor, throwing man against car. Contusion of chest. Returned to work 7-5-39, lost time 14 days. Compensation cost $9.75. Foreman, Gregory and Corley.

1940

James Baker, Loader, age 43, was injured at No. 1 Mine on September 14, 1940. Man trip ran into wrecked tram—man hit chest against end of car. Contusion of chest. Returned to work 10-7-40, lost time 19 days. Compensation cost, $22.30. Foreman, Con Owens.

Ernest Waldron, Trackman, age 35, was injured at No. 1 Mine on October 10, 1940. Man trip wrecked—caught elbow between corners of two cars. Fracture arm above elbow. Compensation cost, $322.21—Supplemental $923.30, total $1245.51. Foreman, Clarence Joyce.

1941

None.

1942

None.

1943

George W. Whitt, Loader, age 39, was injured at No. 1 Mine August 20, 1943. Mantrip wrecked on "Bull dog". Laceration right little finger. Returned to work 9-6-43, lost time 17 days. Compensation cost, $25.71. Foreman, Dick Lawhorn.

Dave Adams, Loader, age 45, was injured at No. 2 Mine on May 10, 1943. While coming out on mantrip—trip stopped suddenly and man was thrown forward in car. Multiple bruises of face. Returned to work 5-19-43, lost time 8 days. Compensation cost $2.57. Foreman, John L. Keene.

[fol. 211] #1 Mine

Tonnage by years:

1939	315,535
1940	502,550
1941	551,409
1942	563,214
1943	417,826 through October
	2,350,534

Compensible Mantrip Accidents

Total number compensible mantrip accidents Jan. 1, 1939—Oct. 31, 1943,	4
Number of tons per mantrip accident,	587,634
Total compensation costs all mantrip accidents,	$1303.27
Cost per ton for mantrip accidents,	.00055
Total number days worked Jan. 1, 1939—Oct. 31, 1943,	1199
Total number mantrips operated Jan. 1, 1939-Oct. 31, 1943	39,790
Number of mantrips operated per mantrip accident,	9948
Total days lost by employees due to mantrip accidents,	211

[fol. 212] #2 Mine

Tonnage by years:

1939	368,551
1940	524,763
1941	464,082
1942	548,568
1943	421,626 through October
	2,327,590

Compensible Mantrip Accidents

Total number compensible mantrip accidents Jan. 1, 1939-October 31, 1943,	2
Number of tons per mantrip accident,	1,163,—
Total compensation costs all mantrip accidents,	$36.09
Cost per ton for mantrip accidents,	.0000015
Total number days worked Jan. 1, 1939-Oct. 31, 1943,	1208
Total number mantrips operated Jan. 1, 1939-Oct. 31, 1943	32,900
Number mantrips operated per mantrip accident,	16,450
Total days lost by employees due to mantrip accidents,	18

[fol. 213] DEFENDANTS EXHIBIT "A"

Constitution of the International Union United Mine Workers of America, Washington, D. C. adopted at Cincinnati, Ohio. November 1, 1942.

Article Two

Third. To demand that not more than six hours from bank to bank in each twenty-four hours and not more than five days per week shall be worked by members of our organization.

[fol. 213a] DEFENDANTS EXHIBIT "B"

Wage Scale Increases Asked and Proposed Corrections of Mining Practices for the Bituminous Coal Industry Adopted by the International Policy Committee of the United Mine Workers of America

Submitted to Appalachian Join Wage Conference 3/10/43

New York, N. Y., March 9, 1943.

The International Policy Committee declares the recommendations contained herein to be the policy of the United Mine Workers of America.

This policy shall be a guide for all districts in the bituminous regions in the negotiating of wage agreements. It shall serve in lieu of all wage scale resolutions submitted to the International Policy Committee from the International Convention, District Conventions, local unions or from any other source.

Appalachian Joint Conference Proposals

1. *Contract Termination.*

That the Appalachian Joint Wage Agreement be extended from April 1, 1943, to March 31, 1944, inclusive, with the following modifications and changes, viz., during the contract period, either party, through representatives designated by the Operators or the International Union, United Mine Workers of America, may terminate the Joint Wage Agreement by giving thirty (30) days' notice in writing, in advance of such cancellation.

2. *Hours of Labor.*

That the maximum hours and working time provisions of the Joint Wage Agreement, including the supplemental agreements regarding the six-day week, be reaffirmed with the following modifications:

(a) The six-day week to terminate when the war emergency ends.

(b) To conform with the basic and legal requirement for the industry, the maximum hours and working time provisions be amended to establish portal-to-portal for starting and quitting time for all underground workers.

3. *Wage Rate Increases.*

Combined cutting and loading rates shall be increased 28¼ cents per ton; 25¼ cents of this amount shall be added [fol. 214] to the existing rates for loaders and 3 cents to existing cutting rates.

Rates for all classifications of inside and outside day men shall be increased $2.00 per day, except those classifications with standard wages, namely, greasers, trappers, flaggers, switch throwers and slate pickers, who shall be increased an additional 85 cents per day.

Monthly men shall receive a directly proportionate increase.

The minimum day rate shall be $8.00 without exception.

The increased rates include compensation to meet the portal-to-portal starting and quitting time.

Pick mining rates shall be increased 28¼ cents per ton.

Yardage and deadwork rates shall be increased 28.57 percent.

Cutting rates on track mounted machines shall be increased 3 cents per ton. Where tonnage rates are paid on conveyors or other mechanical loading devices, the increase shall be 25¼ cents per ton. Footage and yardage rates shall be increased 28.57 percent.

4. *Standard Classifications.*

Standard classifications of men employed on the various mechanized units shall be established in order to eliminate varying sizes of crews. Such classification shall be uniform both as to day and tonnage workers.

5. *Monthly Men in Strip Mining.*

The day and monthly men employed at strip mining operations will have the same wage increases applied and governed by the basic $2.00 per day increase.

6. *Double Time for Sunday.*

Double time shall be paid for all work performed on Sunday.

7. *Vacation Payment.*

The compensation payments for the vacation period shall be increased to Fifty Dollars ($50.00.)

8. *Exemptions under This Contract.*

The term "mine worker", as used in this Agreement, shall include all persons inside or outside of the mine, except the superintendent.

9. *Differentials.*

Existing inequitable differentials within and between districts shall be eliminated, including cutting and loading [fol. 215] rates and all other factors operating to maintain such differentials and inequalities.

10. *Shifts.*

The operation of three shifts within twenty-four hours and concentrated methods of mining, that prevent rock dusting, necessary ventillation to dilute inflammable and noxious gases, and proper inspection, have increased the hazards and resulted in great loss of life. In order to promote safety and establish sound mining practices, we, therefore, demand modification of the provision in the Appalachian Joint Wage Agreement dealing with shifts by limiting the number of shifts so that not more than two can be operated within any twenty-four hours.

11. *Other Provisions.*

Operators who are parties to this Agreement shall include clauses to protect the wage scales and conditions of employment whenever any of their mines are let to any corporation, company or individual for operating purposes. This obligation is to protect the contract and preserve the interest of the miners.

The operator shall be responsible for delivering mine cars to and from the miners' working places.

Only union-made explosives, mine supplies and tools shall be made available for use by the mine workers.

Mine workers shall not be required to pay for safety equipment and devices, including electric light and cap tentals. All day and monthly men shall be furnished necessary tools and equipment without charge.

There shall be no charge to the miners for blacksmithing.

The work week shall begin on Monday and shall be designated in the Agreement.

It will not be a violation of any terms of the Agreement for the mine workers to cease work to prevent shipment of coal to non-union concerns or where a strike is in progress.

12. *District Conferences and Agreements.*

Joint conferences of districts in the Appalachian Region shall be held concurrently with the Appalachian Conference. All other districts shall meet in joint conferences after the Appalachian Agreement is negotiated for the purpose of negotiating district wage agreements pursuant to the basic agreement and this policy.

Wage scale resolutions, affecting local working conditions and rules, shall be made a subject for consideration by all district joint conferences.

Districts shall not negotiate agreements which grant more favorable conditions to the Operators than obtain in the basic contract.

All supplemental agreements shall be approved by the International Union.

[fol. 216] DEFENDANTS EXHIBIT "C"

Washington, D. C.
June 14, 1943.

Supplemental Agreement

The Central Pennsylvania Coal Producers Association and the United Mine Workers of America hereby do agree to continue in effect the Appalachian Agreement dated June 19, 1941, the Supplemental Agreement dated January 29, 1943, and the underlying District No. 2 Wage Agree-

ments, which terminated on March 31, 1943, except as amended and modified herein as follows:

1. In consideration of the payments by the Operators, whether engaged in drift, shaft, slope, strip mine, preparation plant or coke oven operations, of the "portal-to-portal" or "travel time" to their employee members of the United Mine Workers of America, and in full settlement thereof, the United Mine Workers of America agrees to accept in behalf of its members and the operators agree to pay to each and all of its said employees, whether working inside or outside the mine and including monthly men, the sum of $1.30 per day as compensation for the "travel time" of said employees. This said sum of $1.30 per day is agreed upon by the parties hereto to prevent inequities and inequalities, to retain proper relation of wages, proper relation of wages to cost, and to maintain proper and existing competitive factors, marketing methods, rates and other factors customary and inherent in the industry. The payment by the Operators of "travel time" or "portal-to-portal" subsequent to April 1, 1943, is not to be construed by the United Mine Workers of America, by any of its members, or anyone else, as recognition by the Operators of any liability for "travel time" prior to April 1, 1943, nor admission that if [fol. 217] there were a liability, it had not been settled. It is the express intent of all parties hereto that payment by the Operators for "travel time" pay to their employees subsequent to April 1, 1943 and the payment of the sum stipulated herein, shall be and is accepted by the parties as full payment for "travel time" and in full compensation for any and all such claims, if any, by any employee member of the United Mine Workers of America for "travel time", regardless of whether such "travel time" accrued either prior or subsequent to April 1, 1943. The United Mine Workers of America expressly pledges itself to use its good offices to discourage litigation or claims for "travel time" pay accruing prior to April 1, 1943, if any, and by its signature hereto, accepts for its members such agreed payments as stipulated herein in payment for all "travel time" liabilities, if any, prior to April 1, 1943 and will so advise and instruct its said members accepting the terms of this contract.

2. Able-bodied employees shall not be employed at a rate less than $.857 per hour, or $6.00 per day, plus travel time. Physically-handicapped men, boys and superannuated em-

ployees not able to perform normal work may be employed as greasers, trappers, flaggers, switch throwers and slate pickers at a rate of $.736 per hour, or $5.15 per day, plus travel time.

3. The spotting or pushing of cars is referred to the district for consideration.

4. Compensation for vacation with pay shall be increased from $20.00 to $50.00, payable $20.00 on the last payday in June, 1943, and $30.00 on the last payday in July, 1943.

5. The Operators shall furnish necessary tools to day and monthly men without charge. Mine Workers employed at [fol. 218] tonnage, yardage or footage rates shall continue to furnish their own tools as heretofore.

6. Safety equipment, including safety lamps, shall be furnished by the Operators without cost. This shall not include, however, personal wearing apparel such as hats, clothing, shoes and gossles.

7. The charge for blacksmithing shall be eliminated.

8. All employees at mines working six (6) days per week shall be given a fair and equal opportunity to work the six days during any week that the mine works six days. This is not to be construed as a guarantee to give each employee work for six days where work is prevented by reasons of breakdowns, accidents, operating requirements, unsafe conditions or for reasons beyond the control of management.

9. The Supplemental Agreement providing for the six-day work week dated January 29, 1943, shall be continued in effect during the time hereof, but upon the cessation of hostilities the workweek shall automatically revert to five (5) days per week.

10. The changes in the agreements herein provided shall be effective as of April 1, 1943. Retroactive payments due on lamp rentals and blacksmithing shall be paid promptly. All other retroactive payments shall not become due and payable until such time as the proper governmental agency, or agencies, shall have approved and placed into effect increases in maximum prices to compensate the operators for the additional costs ensuing therefrom. Thereafter, the retroactive payments due the mine workers shall be paid in

four equal installments on the four paydays next succeeding the date upon which such increases in maximum prices shall become effective.

11. The Operators agree that they will not lease any operating mines subject to the contract as a subterfuge for the purpose of avoiding the provisions of this agreement.

[fol. 219] 12. Where necessary the Operators shall have the right to rearrange the schedule and operation of mantrips, with due regard to the considerations of safety, convenience and efficiency.

13. This Agreement shall become effective upon its approval by the National War Labor Board and other governmental agencies including those necessary for the adjustment of maximum prices as herein provided.

14. This Agreement is an integrated instrument and its respective provisions are interdependent. In the event that any governmental agency of competent jurisdiction should delete, change, alter or modify any of its provisions, this Agreement may be declared null and void by either party signatory thereto.

15. The Appalachian Agreement dated June 19, 1941, the Supplemental Agreement dated January 29, 1943, and the underlying District No. 2 Wage Agreements, which terminated on March 31, 1943, except as amended and modified herein shall remain in effect until March 31, 1944.

16. This Agreement shall be effective until March 31, 1944.

[fol. 220] DEFENDANT'S EXHIBIT "D"

4th Draft—9/12/43.

Supplemental Agreement between the Appalachian Joint Conference and the Members Signatory Thereto, the International Union, United Mine Workers of America, and the Several Districts Affected

It is hereby agreed by and between the Appalachian Joint Conference and the assenting members thereof, the International Union, United Mine Workers of America, and the several Districts affected, that the Appalachian Wage

Agreement between the above-named parties, dated June 19, 1941, and the supplements thereto and the underlying District Wage Agreements and supplements, which terminated March 31, 1943, is extended as hereinafter provided, except as amended and modified as follows:

1. By reason of the emergency of war and as a contribution to the public welfare; to increase production of coal; to aid in the prosecution of the war and to promote stable and harmonious employer labor relations in the industry, it is agreed that an additional one hour and twelve minutes per day work time shall be added to the — sent basic seven-hour workday, making an eight-hour and twelve minutes shift for each inside mine employee in the accepted term of mine workers whose normal daily tasks require them to travel underground, except that this shall not, however, be construed as a guarantee to give each such employee work for any number of days per week or hours per day where work is prevented by reason of breakdowns, accidents, operating requirements, unsafe conditions, lack of market demand, shortage of transportation or for reasons beyond the control of management. It is agreed that for employees working underground the eight-hour and twelve minute shift shall mean eight and one-fifth hours subject to the orders and direction of the working force by the management. This means further, that employees [fol. 221] shall have no jurisdiction or control over the amount of travel time or the amount of work time at the face or elsewhere. Such work hours begin at the designated portal and end at the designated portal, exclusive of the lunch period not to exceed thirty (30) minutes and a tolerance not to exceed fifteen (15) minutes, a total of forty-five (45) minutes per shift, (the "designated portal" means the portal for each underground mine worker selected by the mine management for the mine worker to enter and depart from the mine. Due consideration shall be given to the convenience of the mine workers and economy of operation in such designation.)

The operators shall arrange the schedule of operation of man-trips and time of descent and ascent in the cage with due regard to considerations of safety, convenience and efficiency.

At all times where man-trips and/or cages or other form of transportation are used for carrying men, the manage-

ment shall post a notice advising of these schedules and state the time thereon of each scheduled man-trip. Matters of dispute as to the schedule or schedules posted shall be subject to the Rules of Procedure for settlement of disputes provided by the Agreement. Where no form of transportation is used and men walk to and from the portal, the same procedure shall follow as to the stating of the time of beginning and end of the shift by posting a notice. Travel time, where more than one method of transportation is used, shall be the sum total of the travel time of each form of transportation and travel. Where breaks occur between one form of transportation and another at shaft mines, waiting time at the bottom of the shaft is not travel time.

Outside employees employed above ground in each classification covered by the basic agreement shall work an additional one hour per day above the present basic seven-hour day, for which hour they shall be paid at the rate of time and one-half, except as provided in the Agree- [fol. 222] ment for workers engaged in continuous operations. Such mine workers shall also receive rate and one-half for the eighth hour. This same provision applies to workers employed in strip mines. This means that any outside employee in any classificati-n may be required, during this additional hour, to work under another classification to which he is assigned, provided that the rate of pay for his regular classification shall not be reduced; and further provided, that when he is required to work under another classification for which a higher rate is provided than his regular classification he shall be paid at such higher rate during the period he works under such higher classification. This shall not change the rates of pay for men who perform their usual and customary tasks in general utility work.

For inside employees the rates of pay, schedules of wages and classification of occupations remain in full force and effect as set forth in aforesaid agreements, except that there shall be added to each mine worker's daily rate of pay the amount of $1.20 for 1.2 hours per day, making eight hours and twelve minutes work per day, including travel time. For time worked in excess of forty hours in any week, the mine worker shall receive pay for such excess hours worked at time and one-half and rate and one-half, as the case may be.

The distribution of the aforesaid $1.20 for 1.2 hours for tonnage, footage and yardage workers shall be as follows:

(a) Shortwall mine machine rates shall be increased — cents (—¢) per net ton of which — cents (—¢) shall be added to the existing rates for loaders and — cents (—¢) shall be added to the existing shortwall cutting rates.

(b) The pick mining rates shall be increased — cents (—¢) per net ton.

(c) Cutting rates on track-mounted machines shall be in- [fol. 223] creased 70% of the shortwall cutting rate increase in each district, or — cents (—¢) per net ton.

(d) Yardage and deadwork rates shall be increased — percent.

(e) A basic inside day labor rate of $8.20 per day for eight hours and twelve minutes of work shall prevail throughout the entire Appalachian Area.

(f) The standard classifications contained in the Appalachian Agreement shall be amended and the rates paid as shown in the schedules attached hereto marked Schedule "A" and Schedule "B".

Where a mine worker leaves his place of work prior to the usual quitting time without the consent of the foreman in charge and before his daily task is finished, such mine worker may be disciplined by suspension or discharge. This shall not, however, penalize such mine worker where he is prevented from completing his normal task by reason of breakdowns, accidents, operating requirements, unsafe conditions or for reasons beyond the control of the mine worker or the management.

Where travel time is in excess of seventy-two (72) minutes, the operator, at his option, shall have the right to lengthen the work day by the amount of time necessary to increase the face time, not to exceed seven (7) hours per shift.

The operators shall furnish necesasry tools to day and monthly men without charge. Tools to men working on company houses shall be furnished in accordance with the customary practice.

It shall be the obligation of loaders to furnish their own tools at their own expense, and to compensate them the

basic tonnage rates shall be increased one-half cent (½¢) per ton and all related tonnage rates shall be increased proportionately. Tools which have been furnished loaders since April 1, 1943, shall become the property of the worker. Squibs, detonators and batteries and shooting cable used [fol. 224] in connection with explosives shall continue to be furnished in accordance with prevailing practices.

Safety equipment and devices, including electric cap lamps, shall be furnished by the operators without charge. This shall not include, however, personal wearing apparel such as hats, clothing, shoes and goggles. In lieu of furnishing carbide lamps and carbide, the operator may, at his option, pay to the mine workers who use carbide lamps at their work five cents per day, and the mine workers shall continue to furnish their own carbide lamps and carbide.

No charge shall be made for blacksmithing.

If the United Mine Workers make a wage agreement during the period of this Supplemental Agreement, covering wages or working conditions with any person, corporation, association or district within the Appalachian Area more favorable to the operators than as contained herein, then this Supplemental Agreement shall be modified so that the operators who are parties hereto shall receive all of the benefits of such more favorable agreement.

For the duration of this Supplemental Agreement, no strikes shall be either called or maintained hereunder.

The operators agree that they will not lease any operating mines subject to this Supplemental Agreement as a sub-erfuge for the purpose of avoiding the provisions of this Supplemental Agreement.

Able-bodied labor employed as Greasers, Trappers, Flaggers and Switchthrowers shall be paid at a rate of not less than $0.857 per hour and $6.00 per day. Able-bodied labor employed as Slate Pickers shall be paid at a rate not less than $0.857 per hour and $6.00 per day. (These classifications when employed inside receive the $1.20 for the 1.2 hours as heretofore provided. When employed outside, these classifications receive pay for work performed on the eighth hour at rate and one-half.)

[fol. 225] The provisions relating to vacations with pay are hereby amended to substitute at the appropriate places therein Fifty Dollars ($50.00) for Twenty Dollars ($20.00).

The vacation payment for the 1944 period shall be made on the last pay day occurring in the month of June of that year.

All employees at mines working six days per week shall be given a fair and equal opportunity to work on each of such six days. Laying off individual workmen during the week for the purpose of denying them six days' work is prohibited during the term of this Supplemental Agreement. This shall not, however, be construed as a guarantee to give each employee work for six days per week where work is prevented by reasons of breakdowns, accidents, operating requirements, unsafe conditions or for reasons beyond the control of management. Individuals required to work longer hours temporarily in any one shift because of accidents or emergencies shall be paid at the rate of time and one-half for such actual time worked in excess of eight hours and twelve minutes. This overtime shall not be used to pyramid the overtime paid after forty hours of work.

Work performed on the seventh consecutive day is optional, but when performed shall be compensated for at double time rates.

This Supplemental Agreement, as to general wage rates, may, on thirty (30) days notice from either party, be reopened for negotiation at the end of the first contract year. The foregoing sentence shall not preclude the parties from mutually agreeing at any time during the term of this Supplemental Agreement, on changes in general wage rates, subject to such approval by the appropriate governmental agencies as may be required by the Act of Congress of October 2, 1942, and the Executive Orders and Regulations issued [fol. 226] thereunder. Furthermore, if at any time during the term of this Supplemental Agreement a significant change occurs in government wage policy, either party shall have the right to request negotiations on general wage rates.

This Supplemental Agreement is an integrated instrument and its respective provisions are interdependent, and shall be in effect only after the approval hereof by the appropriate governmental agencies and after the granting by the Office of Price Administration of advances in maximum prices sufficient to cover the increased costs occasioned hereby.

It is agreed that the operators of mines in the Appalachian Area who become parties hereto shall be parties to

and participate in the conferences to negotiate the basic Wage Agreement to be effective after March 31, 1945.

Executed in the City of Washington, D. C., the — day of September, 1943.

[fol. 227] DEFENDANTS EXHIBIT "E"

The Secretary of the Interior
Washington

November 12, 1943.

MY DEAR MR. LEWIS:

I am enclosing a copy of a letter of resubmission and clarification which I propose to send to the Chairman of the National War Labor Board concerning those matters discussed by the Board, in its Resolution and in the letter of Mr. Davis, both dated November 5, 1943. The expressions of understanding in the enclosed letter were worked out as a result of conferences held between members of my staff and representatives of the United Mine Workers of America.

Will you please advise me in writing that, as President of the United Mine Workers of America, you are in agreement with the statements made in the enclosed letter.

Sincerely yours, (Sgd.) Harold L. Ickes, Secretary of the Interior.

Hon. John L. Lewis, President, United Mine Workers of America, Washington, D. C.

Enclosure.

[fol. 228] "E"

The Secretary of the Interior
Washington

November 12, 1943.

MY DEAR MR. DAVIS:

By Resolution dated November 5, the National War Labor Board approved the Memorandum of Agreement entered into between the Secretary of the Interior and the United Mine Workers of America on November 3, subject

to clarification and resubmission as to the provisions with respect to the payment of tonnage or piece workers and with respect to the "spotting" of mine cars; it was also stated, in your letter transmitting the Resolution, that it seemed to the Board that certain provisions of the Illinois Agreement were not applicable to the Government and should therefore be excluded. In accordance with the Board's Resolution I am sumbitting the following statements in clarification of the matters affecting terms and conditions in the coal mines.

1. For all inside tonnage and piece workers in the bituminous coal mines, the parties have assumed an average travel time throughout all areas of 45 minutes each day. The compensation for all such workers shall be computed as follows: The average rate of earnings per hour for each individual mine worker shall first be determined by dividing the total earnings for that mine worker at the existing regular established rates for all tonnage produced and yardage or deadwork done during the week or pay period by the number of hours worked at the face during that week or pay period (assuming 45 minutes travel time for each day.) This average rate of earnings shall then be paid to the mine worker for the first seven hours of work in each day during the week or pay period; and one and one-half this average rate of earnings shall be paid to him for the eighth hour in each day during the week or pay period (assuming 45 minutes travel time for each day); provided, however, that one and one-half this rate of earnings shall be paid to the mine worker for all hours in excess of 40 hours in each week, including worktime and travel time.

2. For each mine outside of the Illinois area where the practice now prevails the delivery of cars to the working places in the mines by pushing will be the subject of local negotiations and will not be prohibited where it is impracticable to deliver them to the working places otherwise than by pushing. Any controversy as to the continuation of the practice where it now prevails must be considered by the Operating Managers for the United States as a dispute, and shall be settled promptly in accordance with the customary grievance machinery.

3. Paragraph 12 of the Agreement entered into between the Illinois Coal Operators Association and the United Mine

Workers of America dated September 23, shall not be applicable to the Government without prejudice, however, to any position that the United Mine Workers of America may take with reference thereto in connection with any contract to be negotiated with the operators.

[fol. 229] 4. Completely without prejudice to whatever claim the mine workers may have against the operators for liability for portal-to-portal compensation accruing prior to the date of the agreement, paragraphs 13 and 14 of the aforesaid agreement between the Illinois Coal Operators Association and the United Mine Workers of America shall not be applicable to the Government; provided, however, that the compensation paid under the Memorandum of Agreement between the Secretary of the Interior and the United Mine Workers of America dated November 3, shall be construed to be in full settlement and discharge of all portal-to-portal compensation for the period of Government possession covered by the Memorandum of Agreement.

While it is understood that the Secretary of the Interior has no responsibility under the Memorandum of Agreement to pay compensation for portal-to-portal claims prior to November 3, it is recognized that the mine workers have vigorously asserted a claim of liability therefor against the operators, that lawsuits in connection therewith are now pending, that the Illinois operators have offered to settle this liability by the payment of $40 in accordance with the agreement of September 23, 1943, and that the War Labor Board in its opinion of October 26, 1943, has approved the payment of this sum as a reasonable settlement. It is recognized, moreover, that the mine workers have continued work in the belief that their contractual disputes with the operators would be adjusted and adjusted retroactively. Against this background it is clear that maximum productive efficiency is not likely to be restored so long as the claim for past due portal-to-portal compensation remains unsettled. This being so, it is the clear responsibility of the operators and the mine workers to settle this issue at once.

5. Paragraph 15 of the aforesaid Agreement between the Illinois Coal Operators Association and the United Mine Workers of America shall not be applicable to the Government, without prejudice, however, to any position that the United Mine Workers of America may take with reference

thereto in connection with any contract to be negotiated with the operators, and to any request that either the Secretary of the Interior or the United Mine Workers of America may make for negotiations on general wage rates if at any time during the term of the Memorandum of Agreement, a significant change occurs in the Government wage policy.

We are withholding the issuance of any detailed instructions pending the approval of the Board with respect to these matters. Since there is a considerable amount of confusion in the field and production is thereby being hampered, I shall appreciate it if the Board will handle these matters as promtply as possible.

Sincerely yours, Secretary of the Interior.

Hon. William H. Davis, Chairman National War Labor Board, Washington, D. C.

[fol. 230] "E"

United Mine Workers of America

November 12, 1943.

Honorable Harold L. Ickes, Secretary of the Interior, Washington, D. C.

My dear Mr. Secretary:

This acknowledges your letter of today, enclosing copy of a letter you propose forwarding to Mr. William H. Davis, Chairman of the National War Labor Board in clarification of the matters affecting terms and conditions in the coal mines.

As stated to you in conference this afternoon, the provisions set out in Paragraph 4 of your letter to Mr. Davis are not in full conformity with the understanding and interpretation I had of your memorandum of agreement transmitted by you to the Board on November 3, 1943. The policy Committee of the United Mine Workers of America approved the agreement in question and our membership throughout the industry returned to work under the belief that the Government, through your Department, would enforce the stated provisions of the Illinois Agreement as

approved and as modified by the War Labor Board. The Mine Workers of the country are of the opinion that the coal operators are required to pay $40. retroactive pay to each mine worker as stipulated by the agreement in question. Desiring to co-operate with you, however, in clearing these pending issues raised by the Board, I am reluctantly acquiescing with the paragraph afore-mentioned, in the hope that the Mine workers will receive this money.

May not the Mine workers now hope that they will receive full encouragement from you and your staff in seeing to it that the coal operators of this country make prompt settlement and payment to our men who have so long expected and believed, as a result of repeated Governmental assurances, that all of the adjustments and benefits derived from any agreement would be retroactive to April 1, 1943.

Very truly yours, (Sgd.) John L. Lewis, President, United Mine Workers of America.

[fol. 231] DEFENDANTS EXHIBIT "F"

Washington, D. C. November 18, 1943.

The Operators propose that the following provisions be included in a supplemental agreement:

1. All agreements, including district and local agreements, that existed as of March 31, 1943, shall be extended upon the same terms and conditions therein contained except as modified by this supplemental agreement.

2. This supplemental agreement shall include the Ickes-Lewis agreement as approved or modified by the National War Labor Board, subject to modification through the usual processes of collective bargaining.

3. This supplemental agreement shall be in effect only after the approval by the appropriate governmental agencies and after the granting by the appropriate governmental agencies of advances in maximum prices adequate to cover the increased costs arising therefrom.

4. The right of any person, partnership or corporation to remain under governmental control shall be preserved and

the signing of this agreement by parties signatory hereto shall in no manner affect this right.

5. Except for any person, partnership or corporation electing to remain under governmental control, the operators shall make the portal-to-portal payment of $40.00 as provided in the Illinois agreement, and there shall be included in this supplemental agreement appropriate clauses indemnifying the operators against portal-to-portal payment and liability to April 1, 1945.

6. This supplemental agreement shall be an integrated instrument and its respective provisions shall be interdependent.

7. All agreements as modified herein shall continue in effect through March 31, 1945.

[fol. 232] DEFENDANTS EXHIBIT "G"

Office of War Information National Labor Board

B-1127

For immediate release November 20, 1943.

The National War Labor Board today approved the following reply to the Secretary of the Interior's communication of November 12. The Board's vote was seven to five, the labor members and public member, Wayne L. Morse, dissenting.

The letter follows:

November 20, 1943.

MY DEAR MR SECRETARY:

This will acknowledge your letter of November 12, conveying certain statements in clarification of the terms and conditions of employment in the coal mines during the period of government operation. We also received on November 18 the tentative draft of your proposed instructions "to all Operating Managers for the United States for Bituminous Coal Mines."

On November 5, 1943, the National War Labor Board approved the Memorandum of Agreement between the Secretary of the Interior and the United Mine Workers. This approval was subject, however, to clarification and resub-

mission of those terms of the memorandum which related to the pushing of cars and, of particular importance, to the payment of tonnage or piece workers. We pointed out that the submitted agreement had been approved as respects compensation to employees on a day wage basis because such payment was in conformance with the stabilization program. In the first place, it provided, on the average, for eight full hours of productive work in each eight and one-half hour working day with daily compensation to the workers up to forty hours a week in the same amount as under the 1941-1943 agreement. Secondly, compensation at one and one-half times the hourly rate for all hours over forty, including travel time, was specified in accordance with the applicable provisions of the Fair Labor Standards Act. The following basic rules were applied and must be adhered to:

1. The total compensation under the new portal-to-portal contract for the first 40 hours in each week (including the assumed average travel time) must not exceed the compensation for the first 40 hours of each week under the old face to face contract.

2. The premium pay after 40 hours (including the assumed average travel time) must be calculated in accordance with the applicable provisions of the Fair Labor Standards Act.

[fol. 233] The question presented by paragraph 1 of your letter of November 12 is, therefore, whether the new provisions for compensation of inside tonnage and piece workers in the bituminous coal mines conform to these rules.

The method of computing compensation for inside tonnage and piece workers during the first 40 hours of each week, as set forth in paragraph 1 of your letter and as exemplified in your proposed instructions, does result in compensation for the first 40 hours of each week exactly the same as would have been paid under the old 1941-1943 face-to-face contract whenever travel time totaled 45 minutes a day. This method of computation for the first 40 hours can therefore be approved. The proviso at the end of paragraph 1 of your letter, however, cannot be approved. It undertakes to make specific application of the provisions of the Fair Labor Standards Act for all hours in excess of 40 in each week by paying one and one-half times the

straight time productive rate of the old contract for each hour after 40, including productive hours and travel time. So far as we have been able to find out there has been no ruling by the Wage and Hour and Public Contracts Division of the Department of Labor, or by the courts, that supports this method of computation either for tonnage workers or hourly paid workers.

On the contrary, the general practice of the Wage and Hour and Public Contracts division has been to determine the regular hourly rate of pay for computation of overtime from "the weekly wage (including production bonuses, if any) averaged over the regular number of hours worked per week." (Interpretative Bulletin No. 4.) The regular number of hours worked per week includes both productive and non-productive time. The latter may be paid for at a lower rate of pay than the productive time or it may be idle time spent in waiting or other non-productive time. (Interpretative Bulletin No. 13, and see letter to Dillon Anderson, Esq. from the Deputy Administrator of the Wage and Hour and Public Contracts Division dated July 17, 1941.) Under date of December 1, 1942 and January 5, 1943 (R1913 and R1913-a) the Administrator of the Wage and Hour and Public Contracts Division approved an alternative method of computing overtime compensation, in accordance with which the employer might elect to compute the overtime compensation on the rate applicable for the work performed during the overtime hours.

This general practice and its applicability in the case of a mine worker whose travel time is included in his working time under the Fair Labor Standards Act was set forth in our opinion of June 18, 1943 in the Northern and Southern Appalachian cases. It was further amplified in its particular application to the Illinois contract in the special concurring opinion of October 27 in the Illinois case where it was said, as to compensation for hours up to forty per week

> "For 8½ hours portal-to-portal, the 1941-43 Agreement requires the payment of $8.125. The same rate of pay must prevail as a regular rate of pay under the submitted contract if there is to be no wage increase."

[fol. 234] and as to payment for hours over forty

> "A rate of $8.125 for 8½ hours portal-to-portal would not represent a wage increase; but payment at 1½ times

this rate for all hours over 40 in a week would liquidate every possible obligation under the Fair Labor Standards Act."

Under the agreement between the government and the United Mine Workers, the method of computation outlined above would be based upon a rate of $8.50 for 8¾ hours portal-to-portal.

In the absence of an authoritative ruling by the Wage and Hour and Public Contracts Division of the Department of Labor, or by the courts, the War Labor Board cannot approve the method of calculating overtime pay outlined in your proviso since it goes beyond the above stated method of comptuation. Conformance with the Board's opinion, as above outlined, will necessitate but a minor change in your proposed method of calculating overtime but the change is necessary to conform with the requirements of the stabilization program.

2. Paragraph 2 of your letter which deals with the delivery of cars to the working places in the mines is approved, it being understood that a manager will not be required to relieve the miners from pushing the cars when it is impractical to deliver the cars to the working places otherwise than by pushing.

3. Paragraphs 3 and 4 of your letter disposes of paragraphs 12, 13, and 14 of the proposed agreement between the Illinois Coal Operators Association and the United Mine Workers dated September 23, 1943 in accordance with the suggestions in our letter to you dated November 5, 1943.

4. Your disposition of paragraph 15 of the proposed agreement between the Illinois Coal Operators Association and the United Mine Workers dated September 23, 1943, is approved.

5. It has been brought to our attention that during the period of government operation consideration may be given to the application to all the mine workers, including strip mine workers, coke oven workers, and top workers in shaft mines, of the provisions of paragraph 3 of the memorandum of agreement of November 3, 1943 under which the prevailing customary 30 minute lunch period is reduced to 15 minutes and to pay such outside workers for the additional

15 minutes at the rate of time and one-half. Such an application is in no way required by our action on the Illinois agreement. It seems advisable to draw this to your attention to avoid misunderstanding.

For convenient reference the paragraph of the Illinois agreement is quoted below:

> "For outside employees (including strip mine and coke oven employees) an additional one hour per day work time at time and one-half shall be added to the present basic seven-hour work day, making an eight-hour shift for outside employees, excluding lunch time which shall not exceed thirty minutes, except when breakdown of [fol. 235] equipment, accidents, shortages of transportation from the mine, or other causes beyond the control of the operator or operators prevent; *Provided,* however, that lack of market demand shall not permit the operators to operate on less than an eight and one-half hour shift for inside employees and on less than an eight hour shift for outside employees."

This paragraph, providing one additional hour of productive work at time and one-half, is entirely within the wage stabilization rules and was, therefore, approved by this Board. The relinquishment by underground workers of 15 minutes of their lunch period is an arrangement to provide eight full hours on the average of productive work at the face without an increase in the total hours, portal-to-portal.

If, however, during the period of government operation, it is deemed necessary that outside employees work 8½ hours and accomplish this by relinquishing 15 minutes of their lunch period in order to add 15 minutes to their productive time, such additional 15 minutes of productive time could be paid for at time and one-half without further approval by the War Labor Board.

May I add that we assume, as a matter of course, that the contract modifications approved by us with reference to the proposed Illinois contract of September 23, 1943, the memorandum of agreement of November 3, 1943, and your letter of November 12, 1943 are, during the period of government operation, to be applied to the several basic contracts in effect in the 1941-1943 period in the various min-

ing districts. If this assumption is not in accord with your understanding, will you please let us know at once?

Sincerely yours, William H. Davis, Chairman.

November 20, 1943.

Mr. Morse made the following statement for the record in casting his vote on the Board's answer to Mr. Ickes letter of November 12, 1943:

> "Let the record show that I am voting No on any Board action on the Ickes-Lewis Agreement because I consider the agreement contrary to the public interest. In view of my dissenting vote and opinion when the agreement was before the Board for approval, to which vote and views I still hold. I cannot approve any Board action which seeks to effectuate the agreement."
>
> Wayne L. Morse.

[fol. 236] Statement of Industry Members

In its action of today, the Board reemphasized its desire to facilitate, within the limits of its responsibility, the achievement of an additional hour of productive work, making eight full hours per day at the face.

We believe progress has been made toward clarification and solution of the problems that must be faced before there can be mutually satisfactory working relationships under private operation of the mines.

The Board approved the formula for computing earnings of piece workers for hours not in excess of 40 hours per week and drew attention to existing interpretations of the Fair Labor Standards Act that may be helpful in solving the problem of appropriate calculations of payment for overtime after 40 hours in a week.

The Board must conform its decisions to the Fair Labor Standards Act. Therefore, it could not approve the formula proposed.

(S.) George H. Mead, Frederick S. Fales, H. B. Horton, James Tanham.

November 20, 1943.

5172. 11-20-43.

[fol. 237] DEFENDANTS' EXHIBIT "H"

To All Operating Managers for the United States for Bituminous Coal Mines:

A summary of the terms and conditions of employment in those bituminous coal mines under Government possession which had contracts with the United Mine Workers of America for a period ending during the year 1943, as provided for in the Memorandum of Agreement entered into between the Secretary of the Interior and the President of the United Mine Workers of America on November 3 and as approved by the National War Labor Board, by actions dated November 5, 1943 and November 20, 1943, is set forth below. If your mines had such contracts with the United Mine Workers of America, you are directed, as Operating Manager for the United States, to put these terms and conditions in effect as of November 3.

Terms and Conditions of Employment

1. The work day shall be extended as follows, subject to the exceptions noted below:

(a) For all inside employees, a work day of eight hours and 45 minutes (including an assumed 45 minutes for travel time) is established with an intermission of 15 minutes for lunch which is not paid for, making a nine-hour day overall;

(b) For all outside employees (including strip mine and coke oven employees) a work day of eight hours and fifteen minutes is established, seven hours of which shall be paid for at straight time and one and one-quarter hours at time and one-half, with an intermission of fifteen minutes for lunch which is not paid for; making an eight and one-half hour day over all (an illustration of the method of computing the compensation for outside employees is set forth in the Appendix); and

(c) For outside employees whose normal work day heretofore has been eight hours, a work day of eight hours and thirty-five minutes is established, seven hours of which shall be paid for at straight time and one hour and thirty-five minutes at time and one-half (An illustration of the method of computing the com-

pensation for outside employees is set forth in the Appendix).

Exception: When breakdown of equipment, accidents, shortage of transportation from the mine, or other causes beyond the control of the management prevent; provided, however that lack of market demand is not to permit the management to operate on less than an eight and three-quarter shift for inside employees and on less than an eight and one-quarter hour shift for outside employees.

[fol. 238] *Exception:* Time and one-half shall be paid for any time worked in excess of the regular shift in any consecutive twenty-four hour period or in excess of 40 hours in any one week, *provided* that this principle shall not be used to pyramid the payment of overtime, and *provided further* that time and one-half shall not be paid where the regular rotation of shifts requires the working of more than one shift in any consecutive 24-hour period.

2. For all inside employees, work time shall begin at the portal and end at the portal; but in shaft mines, for the purpose of making the operations of lowering and hoisting the men orderly and safe; the man trips shall leave the bottom 10 minutes after the start of each eight and three-quarter hour shift and shall arrive at the shaft bottom five minutes before the end of each eight and three-quarter hour shift (it being understood that the eight and three-quarter hours are exclusive of the lunch period.)

3. All inside employees working on a day wage basis shall be paid the established regular hourly rate provided in the applicable district or other agreement, as amended by the Directive Order of the National War Labor Board dated June 18, 1943, in the Appalachian Dispute (Case No. 111-1284), and subject to the increases provided in paragraph 6 below, at straight rate for eight hours of productive time in each day during the week (assuming 45 minutes travel time for each day) and at special rate equivalent to 2-3 of the established regular hourly rate for the assumed 45 minutes of travel time in each day; *provided, however*, that time and one-half the regular established rate shall be paid for that portion of the productive time worked during the first five operating days in the week after 40 hours have ex-

pired (assuming 45 minutes travel time for each day); *provided, further*, that for all productive time worked in the sixth operating day in each week, time and one-half the regular established hourly rate shall be paid; and *provided*, further, that time and one-half the special rate for travel time (equivalent to 2-3 of the regular established rates) shall be paid for all travel time after 40 hours have expired in the week (assuming 45 minutes travel time for each day.) This paragraph is not to be construed to require payment of time and one-half on Saturday if the individual mine worker has voluntarily laid off on Monday, Tuesday, Wednesday, Thursday, or Friday of the week. In no case shall the payment of overtime be pyramided.

An illustration of the method of computing the compensation for inside day wage employees is set forth in the Appendix.

4. For all inside tonnage and piece workers in the bituminous coal mines, the parties have assumed an average travel time throughout all areas of 45 minutes each day. The compensation for all such workers shall be computed as follows:

The average rate of earnings per hour for productive time for each individual mine worker shall be determined by dividing the total earnings for that mine worker at the existing regular established rates for all tonnage produced and yardage or deadwork done during the week or pay period by the manner of hours worked at the face during that week or pay period (assuming 45 minutes travel time [fol. 239] for each day). This average rate of earnings shall then be paid to the mine worker for all hours of productive time worked in the week (assuming 45 minutes travel time for each day); *provided, however*, that one and one-half this average rate of earnings shall be paid to the mine worker for all productive time worked after 40 hours have expired in the week (assuming 45 minutes travel time for each day).

A special travel time rate equivalent to 2-3 of the average rate of earnings per hour shall be paid for the assumed 45 minutes of travel time in each day; *provided, however*, that one and one-half this special travel time rate shall be paid to the mine worker for all travel time after 40 hours have expired in the week (assuming 45 minutes travel time for each day).

An illustration of the method of computing the compensation for piece work employees is set forth in the Appendix.

5. The man trip motor crew is to be paid straight time for the first seven hours worked and rate and one half for all other time worked over seven hours.

6. The existing rates of compensation for able-bodied trappers, flaggers, switch throwers, greasers and slate pickers shall be increased in all other areas in accordance with the principles applied by the National War Labor Board for the Appalachian area in the aforesaid Directive Order of June 18, 1943.

7. For each mine outside of the Illinois area where the practice now prevails the delivery of cars to the working places in the mines by pushing will be the subject of local negotiations and will not be prohibited where it is impracticable to deliver them to the working places in otherwise by pushing. Any controversy as to the continuation of the practice where it now prevails must be considered by the Operating Managers for the United States as a dispute, and shall be settled promptly in accordance with the customary grievance machinery. In Illinois the pushing of cars as a regular practice and except in cases of emergency shall be prohibited.

8. All employees at mines which prohibited, produce coal six days per week shall be given a fair and equal opportunity to work on each of such six days. Laying off individual mine workers during the week for the purpose of denying them six days' work is prohibited.

Work performed on the seventh consecutive day is optional, but when performed shall be paid for at double rates.

9. The management shall furnish all necessary mine workers' tools at the management's cost. At the option of each tonnage mine worker, where the management has not already purchased the tools owned by the worker or entered into some satisfactory settlement with respect to that matter, the management shall purchase and the mine worker shall sell the tools the tonnage mine worker owns at a price which is equal to one cent per ton for all coal mined by each tonnage mine worker between April 1, 1943, and November 3, 1943, with a minimum payment of $3.00.

[fol. 240] Safety equipment and devices including electric cap lamps, and also carbide lamps shall be furnished by the management without charge. This shall not include, however, personal wearing apparel such as hats, clothing, shoes, and goggles.

No charge shall be made for blacksmithing.

10. In all other respects, operations at your mines shall be conducted in accordance with the provisions of the existing applicable effective district or other agreements, as amended by the aforesaid directive order of the National War Labor Board dated June 18, to the extent that such provisions are not inconsistent with the provisions of the Memorandum of Agreement of November 3.

Any grievances or disputes as to the starting time or as to any other matters shall be handled in accordance with the established practices for the adjustment of such grievances.

(These instructions shall immediately be posted conspicuously at the mining property.

A copy of the Memorandum of Agreement of November 3 is enclosed.)

C. J. Potter, Deputy Coal Mines Administrator.

Enclosures.
Laub
Levy:mh

[fol. 241] Appendix

Computation of compensation is to be paid to mine workers employed on a day wage basis for work performed in an 8-3-4 hour shift, as provided in the Memorandum Agreement of November 3. For this example a rate of $1.00 per hour for straight time and $1.50 per hour for overtime has been assumed.

	Time Underground	Rate of Pay	Compensation Due		Total Time Underground Cumulative (in hours)
Monday	22.5 mins. (.374 hrs.) travel	$0.66⅔	$0.25		.375
	7 hours productive	1.00	7.00		7.375
	1 hour productive	1.00	1.00		8.375
	22.5 mins. (.375 hrs.) travel	.66⅔	.25		8.75
				8.50	
Tuesday (same as Monday)				8.50	17.50
Wednesday (same as Monday)				8.50	26.25
Thursday (same as Monday)				8.50	35.00
Friday	22.5 mins. (.375 hrs.) travel	.66⅔	.25		35.375
	4 hours 37.5 mins. (4.625 hrs.) productive	1.00	4.625		40
	3 hrs. 22.5 mins. (3.375 hrs.) Productive	1.50	5.0625		43.375
	22.5 mins. travel (.375 hrs.)	1.00	.375		43.75
				10.3125	
Saturday	22.5 mins. (.375 hrs.) travel	1.00	.375		44.125
	8 hrs. productive	1.50	12.000		52.125
	22.5 mins. (.375 hrs.)	1.00	.375		52.5
				12.750	
	Total Weekly Wage			57.0625	

[fol. 242] Compensation for Inside Day Man

(Assuming a regular rate of $1.00 per hour. Hours shown in each day are productive hours, assuming a travel time of 45 minutes for each day.)

Pay Period

	M	T	W	T	F	S	S
1st Week	8	8	8	8	8	8	
2nd Week	8	A	8	8	8	8	
3rd Week	8						

A—Absent

1st Week	37.75 × 1.00	=	37.75	
	11.375 × 1.50	=	17.0625	
	3.375 × .6666	=	2.25	
				57.06
2nd Week	37.00 × 1.00	=	37.00	
	3.375 × 1.50	=	5.0625	
	3.375 × .6666	=	2.25	
				44.31
3rd Week	8 × 1.0	=	8.00	
	.75 × .6666	=	.50	
				8.50
Total Compensation for Pay Period				109.87

[fol. 243] Time to be Paid for in Week Expressed in Decimals of Hours

Monday	.75	hours travel at 2-3 rate
	8.00	hours productive at straight rate
Tuesday	Same as Monday	
Wednesday	Same as Monday	
Thursday	Same as Monday	
Friday	.375	hours travel at 2-3 rate
	4.625	hours productive at straight rate
	3.375	hours productive at rate and one-half
	.375	hours travel at straight rate
Saturday	8.0	hours productive at rate and one-half
	.75	hours travel at straight rate

Cumulative Time for Man Working in Any Week

1 Day	.75	hours at 2-3 rate
	8.00	hours at straight rate
2 Days	1.5	hours at 2-3 rate
	16.0	hours at straight rate
3 Days	2.25	hours at 2-3 rate
	24.00	hours at straight rate
4 Days	3.00	hours at 2-3 rate
	32.00	hours at straight rate
5 Days	3.375	hours at 2-3 rate
	37.00	hours at straight rate
	3.375	hours at rate and one-half
6 Days	3.375	hours at 2-3 rate
	37.75	hours at straight rate
	11.375	hours at rate and one-half

[fol. 244] Compensation for Inside Tonnage and Piece Workers Where Records Are Kept on a Pay Period Basis

	M	T	W	T	F	S	S
1st Week:							
Tons	6	8	15	14	9	5	
Yardage	7.00	6.50			1.00	4.00	
Deadwork hours	½	0	0	00	0	1-½	
2nd Week:							
Tons	7	A	6	8	4	8	
Yardage		A	2.00		5.00		
Deadwork Hours	0	A	0	1	0	½	
3rd Week:							
Tons	8.85						
Yardage	2.00						
Deadwork hours	0						

"A"—Absent.

Earnings computed at established straight rate:	
98.85 net tons handloaded coal at $.87	$ 86.00
3½ hours of deadwork @ $1.00 per hour	3.50
Total yardage at established rates	27.50
Total earnings	$117.00
Productive hours (assuming .75 hours travel time for each day worked)	96
Average rate of earnings per hour $117.00 ÷ 96 =	$ 1.2187
2-3 average rate $1.2187 × .6666 =	$ .8125
Rate and one-half average rate 1.2187 × 1.5 =	$ 1.8281

1st Week:	37.75 × 1.2187 = $46.0059		
	11.375 × 1.8281 = 20.7946		
	3.375 × .8125 = 2.7422		
			$ 69.5427
2nd Week:	37.00 × 1.2187 = $45.0919		
	3.375 × 1.8281 = 6.1698		
	3.375 × .8125 = 2.7422		
			$ 54.0039
3rd Week:	8 × 1.2187 = $ 9.7496		
	.75 × .8125 = .6094		
			$ 10.3590
Total for Pay Period			$133.91

[fol. 245] Computation of compensation to be paid to all outside employees (including strip mine and coke oven employees) employed on a day wage basis for work performed in an eight and one-quarter hour shift, as provided in the Memorandum of Agreement of November 3. For this example a rate of $1.00 per hour for straight time and $1.50 per hour for overtime have been assumed

				Total Worktime Outside Cumulative—in Hours		
Day	Work Time Outside	Rate of Pay	Compensation Due	Straight Time	Time and One-Half	Cumulative Total
Monday	7 hours straight	$1.00	$7.00			
	1¼ hours at 1½ time	1.50	1.875			
			$8.875	7.00	1.25	8.25
Tuesday (same as Monday)			8.875	14.00	2.50	16.50
Wednesday (same as Monday)			8.875	21.00	3.75	24.75
Thursday (same as Monday)			8.875	28.00	5.00	33.00
Friday (same as Monday)			8.875	35.00	6.25	41.25
Saturday	8½ hours at 1½ time	1.50	12.375	35.00	14.50	49.50
Total Weekly Wage			$56.75			

* * * * * * *

NOTE: When a mine worker employed on a day wage basis performs work during the day or week at two or more classified occupations, bearing different rates, his overtime rate shall be computed as follows:

Divide the worker's total earnings for the day or week at the existing established classified rates as amended by the Directive Order of the National War Labor Board dated June 18, 1943, by the total number of hours worked during the day or week at the classified occupations (assuming 45 minutes for travel time in each day.) This will give the average rate of earnings per hour for the individual mine worker. One and one-half time this avgrage rate will constitute the overtime rate for the mine worker.

[fol. 246] DEFENDANTS EXHIBIT "I"

841

JEWELL RIDGE COAL CORPORATION

SPECIAL RULES

For the Safety and Operation of Mines

Adopted in Conformity with the Mining Laws of the State of Virginia (Sec. 1887-1)

TAKE HOME AND STUDY

OCTOBER 1, 1940
REVISED OCTOBER 1, 1941
REVISED JULY 1, 1942

843

JEWELL RIDGE COAL CORPORATION

Mine No. 1
JEWELL RIDGE, VA.

Mine No. 2
JEWELL VALLEY, VA.

SPECIAL RULES

For the Safety and Operation of Mines

Adopted in Conformity
with the
Mining Laws of the State of Virginia
(Sec. 1887-1)

October 1, 1940
Revised October 1, 1941
Revised July 1, 1942

SPECIAL RULES FOR THE SAFETY AND OPERATION OF MINES

Sec. 1887-1, Mining Laws, State of Virginia:

The operator of every coal mine shall have the right to adopt special rules for the safety and operation of his mine or mines, covering the work pertaining thereto inside and outside of the same, which, however, shall not be in conflict with the provisions of this chapter. Such rules, when established, shall be printed on cardboard, in the languages spoken by ten or more employees, and shall be posted in the drum house, tipple, or at some other conspicuous place about the mines, where the same may be seen by all employees at such mines. When such rules are so posted, they shall operate as a notice to all employees at such mine of their acceptance of the contents thereof. It shall be the duty of each mine operator to furnish a printed copy of such rules to each of his employees when requested by either or any of them.

GENERAL RULES

1. Strict compliance with the mining laws of the State of Virginia and of the following Company Rules shall be the first duty of each and every employee.

2. Report any dangerous condition or practice that may come to your attention.

3. Do not wear loose-fitting or ragged clothing. Gauntlet gloves must not be worn. Adequate safety-toed shoes and adequate safety hats are required by all employees in and about the mines. New miners will not be allowed to go in the mine without a full kit of tools in good condition.

4. Whenever a serious accident, or one that could have been serious, occurs at either mine, this information should be phoned to the main office immediately so that the Investigating Committee can be notified.

5. An Investigating Committee, composed of Superintendent, Company Inspector, Mine Foreman, Engineer, and Assistant Foreman or Electrician, shall investigate and report on all serious accidents.

6. Do not practice any tricks, horseplay, wrestling, or throw any material whatsoever while in or about the mines.

7. No switches shall be thrown except by motorman or brakeman.

8. Do not ride on any trip except the man trip.

9. Jumping on or off moving cars or motors is strictly forbidden.

10. Goggles shall be worn by every workman while doing the following kinds of work:

(1) Breaking up sandrock with a sledge hammer.

(2) Cutting hitches in sandrock for machine jacks.

(3) Operating rock drills.

(4) Scraping any kind of material with a cold chisel.

(5) Using either electric or acetylene welders.

(6) Operating emery wheels, lathes, or drill presses.

(7) Babbitting or soldering with a ladle.

(8) Using striking tools of any nature.

The workman will be responsible for the care of his goggles.

11. Do not pile material so high that it will fall over.

12. When a workman removes a cover from any opening in the floor, ground, valve, pit, or sewer, he must take such steps as are necessary to guard that opening so that no one will fall into it.

13. Every employee, except those in the proper discharge of their duties, is forbidden from opening and not closing any door used for directing ventilation, tampering with, moving or handling any ropes, wires, motors, mining ma-

chines, cars, air compressors, switches, signals, lights, notices, tools, machinery or other equipment of any kind, inside, outside, or about the mine.

14. Rock drillers, sand driers, and oil or calcium sprayers are required to wear respirators while on duty.

15. When an employee is injured in the course of his employment, it shall be his duty to report such injury, no matter how trivial, within 24 hours, to his Assistant Foreman or the Mine Foreman. If the injury be of such a serious nature that he is unable to report in person, the Mine Foreman and Assistant Foreman shall forthwith file a report of same in the company office, including names of witnesses, within 24 hours.

16. All employees, upon entering the mine, shall go directly to their working places (do not take short cuts over dangerous places); and no person shall be permitted to loiter in or about the mines, buildings, or machinery at any time. Loitering or sleeping around the sand house or sand drier is positively forbidden.

17. Brattice men shall see that all debris around where a stopping has been built is cleaned up, especially boards with protruding nails; and any lumber remaining from the job shall be gathered up and moved to the next break-through where a stopping is to be built. He shall not put a belt on a running pulley. Brattices must be hitched six inches in the solid.

18. Look out for trip light on the rear end of trips before proceeding along haulage roads. Always be on the lookout for the second approaching motor. Be careful while walking along haulage roads.

19. Any person wishing to be absent from duty should apply to and receive permission from the Mine Foreman.

20. Each employee, before entering the mine, shall deposit his check on a board provided for that purpose, or deposit check with lamphouse man. On leaving the mine each man must remove his check from the check boards. Failure to check in and out will be cause for discipline.

21. After finishing work, all day men, or company men, shall put their tools in the place provided by the Mine Foreman or Assistant Foreman. All scrap iron, salvaged material, etc., must be deposited in the proper place.

22. Every employee whose duties require him to work with an appliance or piece of equipment of any kind shall report any defects to his foreman.

23. Any person found with tools belonging to another, or found taking tools belonging to another, without the owner's permission, shall be subject to discharge and prosecution.

24. If in doubt as to the meaning of any rules, employee shall apply to the Foreman, or Superintendent, for explanation.

25. Penalties are provided for ordinary infractions of the Company Rules, but a more severe penalty may be given for a flagrant violation resulting in severe accident, fatal injury, or unwarranted destruction of property.

26. No employee of this company is required or expected to work in any place of unnecessary danger, or to do anything in conflict with the Mining Laws of the State or with the Company Rules. A faithful observance of these Laws and Rules is expected and required.

27. Derails shall be installed on all entries going to the rise or dip, at a location approved by the Superintendent and Inspector.

28. Safe working clearance should be made and maintained at all switch throws.

RULES FOR MAN TRIPS

29. All man trips shall be handled with caution, and every foreman in the man trip shall be responsible for the safety of the men and see that all rules covering these trips are complied with.

30. All man trips shall come to a **full stop,** and a signal shall be given by official in charge of man trip, before anyone gets on or off. The official in charge must give signal before trip is moved.

31. No standing up or changing from one car to another while trip is in motion will be tolerated.

32. All men shall ride on the off side from trolley wire, and cars shall not be overcrowded.

33. The speed of the man trip shall not exceed *6 miles per hour,* and motorman shall keep trip in control at all times in order that he may stop trip within the length of itself.

34. No man trip other than the regular man trip shall run except on orders from the Mine Foreman.

35. Wrestling, throwing materials, or horse-play of any kind is positively prohibted on any man trip.

36. One car in each trip will be designated as a tool car and all tools must be deposited in this car; no one shall be permitted to ride in this car.

Penalty for failure to observe any of the above rules shall be:

1st offense—warning.
2d offense—2 days lay off.
3d offense—5 days lay off, or discharge.

RULES FOR SAFETY LAMPS

37. Tampering with, or rough handling of, an electric cap lamp is a violation of the rules of this company.

38. Employees are absolutely prohibited from taking their electric cap lamps home with them.

39. Under no conditions shall an electric cap lamp be used for shooting.

Penalty for failure to observe the above rules shall be:

1st offense—warning.
2d offense—2 days lay off.
3d offense—5 days lay off, or discharge.

RULES FOR LOADERS OR MINERS

40. The miner is responsible for his electric cap lamp from the time it is checked out until it is returned to the lamp house.

41. Each miner shall go directly to his working place, and on entering his working place he shall examine it carefully, take down all loose and dangerous roof rock with a slate bar or wedge, or make it safe by timbering, and otherwise make his place safe before proceeding with his work.

42. TIMBERING AND CLEARANCE: Regardless of roof conditions, timbers must be set in clean-up places, as near the face as the safe operation of the cutting machine will permit. In ROOM work, timbers on the clearance side shall not be set less than forty-two inches from the track and on the gob side not less than thirty-six inches from the track. A miner, on entering his place and finding a fresh cut, should first examine his top and set a side timber on each side of track not more than twenty-four inches back from the face. Center or safety timbers shall then be set BEFORE any shots are fired. Header blocks are to be used on all timbers as directed.

43. On main trolley haulways there shall be maintained continuous clearance of not less than fifty-four inches from the track on the side opposite the trolley wire and a clearance of not less than thirty-four inches from the track on the wire side.

44. Every miner, during his shift, shall keep his working place safe at all times. He shall bar down or timber properly all doubtful or dangerous pieces of bad top and obey, without delay, all orders from his foreman in respect to these matters. The vibration method of detecting bad top, by using the finger tips and tapping roof with a pick, is to be used.

45. Should an unsafe condition arise through failure to get proper supplies, defective material, or other causes which would endanger your life or that of others, cease work at once and notify the Assistant Foreman.

46. No miner shall leave his working place during his shift to visit other working places on his section, or other portions of the mine.

47. See that cars in your working place are secured with an approved car stop.

48. Never carry tools or other materials on your shoulder; they may come in contact with electric wires or loose pieces of roof and result in personal injury.

49. Each miner shall provide himself with the proper tools for the safe performance of his duties. These shall include a pick, a shovel, a dust

shovel, a shooting battery, a saw, a slate bar, a wedge, a hammer, a hundred-foot shooting cable, an approved tamping bar, an explosives knapsack, and an exploder container. Tools with mushroomed heads, broken handles, or loose heads are prohibited from being used.

50. Every miner shall notify the Assistant Foreman of his timber requirements at least one day in advance. In case of an emergency the timbers may be ordered immediately.

51. Miners are positively forbidden to move cars in the working places or to drop cars back along the rib for loading. Motor crews will place all cars, and brakemen will attach or detach approved car stops.

52. Miners are absolutely not permitted to remain at the face of a working place while the machine is cutting.

53. Listen for motor and be in the clear when cars are placed at your working face. Do not stand or sit near a switch or curve when motor or cars are passing.

54. Before returning to work after firing a shot, make a careful examination as to the condition of the roof.

55. When cleaning up for the cutting machine at the end of the shift, each miner must see that his place is properly "squared up" and ready to be cut. All top scales, drawrock, loose dirt and slate must be picked up and moved back out of the way.

56. Ribs designated as "clean side ribs" **must be kept clean at all times as directed.**

57. Inspect all empty cars placed up in your place and remove all dirt, sand, timbers or supplies before starting to load.

58. Rock shall be broken down to a convenient size to handle, and no rock shall be cribbed or loaded above the top of the car.

59. Tools not being used shall be placed along the rib in an orderly manner 10 feet back of the working face.

60. **All "bug dust" or machine cuttings must be removed from the kerf** and either gobbed well in the clear or loaded out of each working place before shots are fired.

61. Care must be taken to see that foreign material is not loaded out with the coal. Mining tools, drills, wrenches, machine bits, spikes, wood chips, track bolts and metal scraps lost in the coal may cause serious injury to some one or damage to coal crushers and stoker apparatus.

Penalty for failure to observe any of the above rules shall be:

1st offense—warning.

2d offense—2 days lay off.

3d offense—5 days lay off, or discharge.

RULES FOR EXPLOSIVES AND SHOOTING

62. Only one day's supply of explosives and detonators shall be taken in the mine at one time.

63. The company sells permissible explosives and Cardox and proper detonators for use with them. No employee shall take into the mine or use any explosive or means of firing it except that supplied or approved by the company. The company reserves the right to determine the quantity of explosive to be used in any one shot. In no case shall more than one kind of explosive be used in the same hole. Cardox must be wired with approved wire.

64. Exploders or detonators must be carried in wood containers.

65. Explosives must be carried in a suitable knapsack or other safe receptacle.

66. Explosives and detonators must be stored in cubby holes 15 feet apart at least 100 feet from the face of working place.

67. Only one shot shall be fired at a time, except by special permission of the Mine Foreman. Clay or other incombustible material shall be used for tamping, and paper dummies shall be used in tamping holes.

68. All shots shall be fired by electric detonators and an approved battery. Under no circumstances shall shooting off trolley lines, power lines, or electric cap lamps be permitted.

69. A well-insulated wire shall be used for the connection to be insulated or "hot" terminal of a Cardox shell.

70. Cardox shells shall be wired at the working face only.

71. All shots must be placed in holes drilled for them. "Mudcapping," or dobie shooting, is positively forbidden.

72. After a powder shot has been fired, the miner, before starting to work, shall wait for at least 5 minutes before returning to the face.

73. No person shall return to a missed shot fired by electricity until all wires have been disconnected from battery and the ends of the cable twisted together, and he shall then report to the foreman for instructions.

74. No coal shall be shot off the solid except by special permission of the Superintendent or Mine Foreman.

75. Drill holes along rib in advance work shall be drilled parallel with the centers in the place and as close to rib as possible. Breakers or center holes may be drilled on an angle.

76. All drillings shall be removed from the hole before it is loaded.

77. It shall be the duty of every miner firing a shot to give the alarm by shouting "Fire"! At any place where pillars, or where places are driving together and are known or thought to be less than 20 feet apart, miners must notify the men working in these places before shooting.

78. Shots are not to be fired unless place is timbered according to standard.

79. The shooting cable should be kept away from the track and should be supported along timbers wherever possible. The wires at the firing end shall be kept twisted together, or short-circuited, except when shots are fired.

80. Bulldozing, such as mudcapping, will not be permitted in the breaking of rock. Assistant Foremen will furnish small hand drills for drilling rock that must be shot.

Penalty for failure to observe the above rules shall be:

1st offense—warning.
2d offense—2 days lay off.
3d offense—5 days lay off, or discharge.

RULES FOR TRACKMEN AND TRACK HELPERS

81. Before beginning work on the track, trackman shall examine the condition of the roof at the place where the work is to be done and make the same secure either by timbering or pulling down any loose slate that might be found.

82. Should it be necessary to remove a timber in order to lay track, wait until your Foreman has made an examination of the condition in your presence and has given you full instructions as to how the work shall be done. In entries where top slate is shot, special attention should be given to brows along the ribs.

83. Full-length angle bars and four-bolt splicing, of correct size, shall be used on all main-line track and haulways.

84. Spring switch throws shall be used on all switches.

85. Two guard rails shall be used on all switches except room and cross-cut switches.

86. No joint will be permitted in room track with less than two bolts. All jumpers must have holes drilled in both ends.

87. Do not leave track work until you would feel safe to run a motor over it yourself.

88. A repair job will not be considered complete until all refuse is cleaned up and all unused material is returned to its proper place or transferred to another job and track is filled level with the top of the ties.

89. Tools must be kept in good condition and free from mushroom heads. Do not use tools with broken handles or loose heads. Goggles are required when striking tools are being used.

Penalty for failure to observe the above rules shall be:

1st offense—warning.
2d offense—2 days lay off.
3d offense—5 days lay off, or discharge.

RULES FOR TIMBERMEN

90. A careful examination of the area around which work is to be done must be made before starting to work. Be sure that you are thoroughly familiar with conditions in the place before any change of timbers is made. Get full instructions from Foreman before any timbers are removed or changed. A careful examination must be made for concealed kettle bottoms, or other dangerous slate. If old timbers are to be removed, they must be shot out under supervision of the Assistant Foreman.

91. Do not work under exposed or bare power lines unless absolutely necessary.

92. Do not use hammers or other tools with mushroomed heads. Do not use any tools with broken handles or loose heads.

93. Do not leave a job until it is cleaned up or some arrangements made to have it cleaned up. Timbers must be set so as to give standard clearance on *entries* of not less than **fifty-two inches,** and in *rooms* not less than **forty-two inches,** on the clearance side.

94. When working on a fall, or timbering, if you cannot complete the job on your shift, you must notify Foreman or Assistant Foreman. Put up a danger sign to notify men approaching the place.

Penalty for failure to observe the above rules shall be:

1st offense—warning.
2d offense—2 days lay off.
3d offense—5 days lay off, or discharge.

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RULES FOR MOTORMEN

95. Only regularly employed motormen shall operate locomotives unless permission in writing is first granted by the Mine Foreman. This does not apply to persons inspecting or repairing locomotives.

96. Examine and oil your motor before starting to use it, and see that all parts visible are in good condition. If motor is not in good condition, notify the Shop Foreman or Mine Foreman before taking it into the mine.

97. When there is no regular motorman or brakeman on a trip or a motor, no one else is to assume the part of motorman or brakeman, or act as motorman or brakeman. All others, other than the regular motorman and regular brakeman must ride in an empty car attached to the motor.

98. No person, other than the brakeman, and he only in the discharge of his duty, can get on or off a motor or car while in motion.

99. No person shall be permitted to ride on the outside of any motor or car. Brakeman may ride rear bumper of trip.

100. Motormen and brakemen shall use care in handling motors and cars. It shall be their duty to see that there is a conspicuous light on the front, and a light on the rear, of each trip of cars on main haulage ways.

101. Motormen must give the brakemen sufficient time to couple and uncouple cars and throw switches.

102. Back-poling and nipping are forbidden unless absolutely necessary.

103. Employees operating motors shall not attempt to oil, open or adjust sandpipes, headlights, or do other repair work while the motor is in motion.

104. *No goosing or generating* the motor will be permitted.

105. Motormen are strictly forbidden to reach out over or under the motor to hold or attempt to hold sand pipe over the rail while motor is in operation.

106. Should it become necessary for the Foreman to send any one to the outside, either sick or injured, or for any other purpose, the Foreman must send an empty car or cars with separate motor to convey such person to the outside. Under no condition shall an empty car or cars be placed between the motor and loaded trip.

107. Under no condition shall a man car, or cars, be hauled on the rear end of a loaded trip, with the one and only exception of hauling the machine crews, at which time the trip shall be hauled at man-trip speed.

108. At No. 1 Mine, a car for machine crews may be placed on rear of trip at "Top of Hill" on Jones Fork. No machine crew car will be hauled from No. 4 Mine without a motor on rear of trip and car on rear of motor.

109. Motormen and brakemen must give special attention to materials (track, timbers, collars,

etc.), and must deliver them promptly. He will under no circumstances carry such material on top of his locomotive, but will haul them in an empty car.

110. At least two cars shall be placed between locomotive and cars carrying long timbers, pipe, etc.

111. Motormen shall not move trips until given proper signal by the brakemen. All signals to be given with a police whistle.

112. "Bucking" cars or motors on the tracks is positively prohibited.

113. An interval of at least 500 feet shall be maintained between locomotives traveling in the same direction.

114. Cars that are left standing must be secured with an approved "chain dog" or car stop wherever practical.

115. Motormen shall shut off controller whenever there is a power interruption and set hand brakes. On motors equipped with air brakes, the motorman is required to set hand brakes and leave controller in neutral before leaving the motor for any cause.

116. Motormen are warned not to be "power hogs." Whenever there is a power interruption or a low voltage, shut off your controller and wind your hand brake. Whenever power starts to become normal wait about 30 seconds to allow power to build back up to capacity. Sitting with

a controller open during power trouble is subject to disciplinary action.

117. Motormen shall not place the trolley pole on the wire while standing by side of motor without first seeing that the controller is on the "OFF" position and brake is set.

118. Motormen at the end of the shift are instructed to take their motors to the motor barn and not to leave their motors until they can get to the barn; and there report any needed repairs to their motor. The practice of leaving motors in driftmouth, at sand house, or on main line, is positively prohibited.

119. Motorman must not use his motor to push a switch back into place after it has been knocked out of line nor use a pole to push cars.

120. Motormen shall look out for machine crews at all times while machines are cutting on shift.

121. Clearance lines are plainly marked on the top at all sidetracks, coal and slate holes and storage holes; and it is the duty of every motorman and brakeman leaving a trip of loads or empties at any of these points to see that the cars are spotted behind these clearance lines.

Penalty for failure to observe any of the above rules will be:

1st offense—warning.
2d offense—2 days lay off.
3d offense—5 days lay off, or discharge.

RULES FOR BRAKEMEN

122. Do not operate a motor unless written permission has been given you by your Foreman.

123. Do not fail to see that cars standing on grades are always secured with an anchor chain or clevis. It shall be the duty of the brakeman to fasten and unfasten approved car stop.

124. Give proper attention to all safety derail switches and all ventilating doors. All ventilating doors must be kept closed except when passing through door.

125. Do not stand in front of approaching cars or motors.

126. Brakemen shall under no condition stand up in, or run along tops of, loaded or empty cars, while in motion.

127. Drags must be used on rear end of trips operating against grades.

128. Trip lights must be used at all times while running on main haulage roads.

129. Where slides are used in trips, do not place them under rear car.

130. **The use of a jack stick for putting on wrecked cars is positively forbidden.**

131. Brakemen are not permitted to let anyone ride on the loaded trip.

132. Brakemen must not stand on bumper or with their feet on or inside the rail, when making a coupling.

133. See that switch is thrown before giving the motorman the signal to proceed—all signals to be given with police whistle.

134. Cars and motors must not be coupled or uncoupled until they have come to a stop.

135. Brakemen are forbidden to ride on bumpers between cars, or *on* bumpers between car and motor, or *on bumper* in front of *any* car, whether empty or loaded, if being pushed; and *when empty must ride inside the car.*

136. Brakemen, after putting on a wreck, shall clean up all debris around the point of wreck and check the track for repairs. If track needs repairing, he shall report same to trackman or Foreman immediately.

137. Coupling "over top" is forbidden, and in such cases where a coupling cannot be made with a regular link and pin, a hook and link shall be used.

138. Slides removed from trip must not be left between rails, but placed well in the clear.

Penalty for failure to observe the above rules shall be:

1st offense—warning.
2d offense—2 days lay off.
3d offense—5 days lay off, or discharge.

RULES FOR MACHINE MEN AND HELPERS

139. It shall be the duty of the machine runner to see that his machine is in good repair and well lubricated. Examine all exposed parts carefully and promptly report all mechanical defects to Shop Foreman or Mine Foreman.

140. Do not attempt to make repairs to machine while the motor is running.

141. In the case of a power interruption or low voltage, the machine runner shall shut off his controller at once and at 30-second intervals he shall open his controller on the first point only to see if power has returned or not.

142. The machine men must examine carefully for loose slate or other unsafe conditions before starting to cut. Do not cut a place if in your opinion it is dangerous. If you are in doubt as to safety of the place after you inspect it, demand an inspection by the foreman in charge of your work.

143. The machine runner is responsible at all times for the safety of the helper. Riding on the cutter bar is forbidden.

144. The machine runner shall not attempt to cut a place without a helper, nor shall he operate his machine if more than he and his helper are in the place. He will not allow any one, other than his helper, to ride on the machine.

145. Mining machines shall be so placed upon sumping up and cutting across place, for each

cut, that the least possible amount of coal may be left under the cut, and the machine crew must sprag all coal where necessary.

146. The machine runner must see that the machine bits are set to gauge at all times.

147. See that the machine is set up properly and securely. Give special attention to setting jacks. Helper should hold jack in position until it is tightened securely in the top. Move the machine from the trucks to the coal in high speed. Before sumping cut is started machine must be put in slow speed and remain in slow speed during the entire cutting of the place. Do not pass over cutter bar at any time.

148. From time to time during progress of the cut, the machine runner and helper must examine the working place to see that it is not becoming unsafe. If a dangerous condition arises, the machine man may add or set additional timbers for his safety. If it is necessary to change or remove a timber while cutting, other timbers to take their place must be set under the supervision of a Foreman. Under no circumstances shall a machine crew continue to cut a place knowing that an unsafe condition has arisen. If it is a condition that cannot be corrected, remove the machine, if it is safe to do so, to a safe place and notify the Mine Foreman.

149. The practice of moving machines at the face by what is known as "walking the bits" is prohibited.

150. Mining machines must not be used for moving cars.

151. Machine men cutting on a section should watch for motors and not move out on the track in front of them, as the motors have the right-of-way at all times.

152. Always be certain that the bit clutch is disengaged and the *safety dog or clevis is placed on the cutter bar before you transport the machine.* Clevis *must* be kept on cutter bar at all times except while cutting chain is in motion. Do not let machine drift down grades.

153. It is the duty of the machine crew to remove all bits from the cutter bar before moving a machine to the shop for repairs.

Penalty for failure to observe the above rules shall be:

1st offense—warning.
2d offense—2 days lay off.
3d offense—5 days lay off, or discharge.

RULES FOR PUMPMEN

154. It shall be the duty of the pumpmen to keep the pumps in their charge in good condition for service and see that they perform the work required of them.

155. It shall be the duty of the pumpmen to keep the vicinity of the pumps under their care in an orderly condition. All worn-out pump parts, valves, fittings, etc., shall not be allowed to accumulate around a pump, but shall be taken to

the outside and properly disposed of in correct scrap pile.

156. Reports of insufficient power or low voltage shall be reported daily.

157. Ordinary repairs of pumps and pipe lines shall be made by pumpmen.

158. Serious damage or breakage of pumps, or failure to keep the water within safe limits, shall be reported immediately to Shop Foreman or Mine Foreman.

159. Precautions shall be taken against the loss of a pump through roof fall or drowning.

160. All machinery shall be stopped before attempting to oil or grease it.

161. A pump shall not be run unless it is equipped with an enclosed switch, starting resistance and properly grounded.

162. Couches or improvised beds at pump stations or other places are absolutely prohibited.

Failure to observe the above rules will call for disciplinary action as follows:

1st offense—warning.
2d offense—2 days lay off.
3d offense—5 days lay off, or discharge.

RULES FOR FOREMEN AND ASSISTANT FOREMEN

163. It is the Foreman's and Assistant Foremen's first and unceasing duty to watch carefully and require employees under their supervision to strictly observe the Mining Laws of the State of Virginia and the Rules promulgated by the Jewell Ridge Coal Corporation for the purpose of avoiding injuries to employees. Any infraction of the Law or of these Rules which you yourselves cannot remove must, without delay, be reported to the Superintendent. You must require strict obedience to your orders and enforce rigid discipline.

164. Visit and carefully examine each working place in the mine or on your section at least once each day while miners of such places are at work. More visits shall be made where necessary.

165. See that each and every working place is properly secured by props or timbers where necessary. If a dangerous condition is found in a place, DO NOT LEAVE THE PLACE UNTIL IT IS MADE SAFE, or remove the person working therein until the place is made safe by some competent person designated for that purpose.

166. Examine roof conditions on all haulage ways that come within your jurisdiction, and remove, or have removed, any dangerous condition.

167. Examine all clean-up places to see that they are safe to cut; do not leave the safety of the place to the judgment of the machine men.

168. It is the duty of each Assistant Foreman to explain the rules pertaining to his work to every new man. It is also part of the Assistant Foreman's duty to take every new miner to his place and carefully instruct him as to the rules of the company, the proper way to clean a cut of coal, the proper disposal of gob, and in the dangers of traveling to and from his place.

169. It is the duty of the Foreman and Assistant Foremen to stop men under their supervision from prizing slate down on the mine cars, and to check slate cars for unduly large pieces of slate that might cause trouble and delay at the slate dump or in transit.

170. Each Assistant Foreman shall have, and keep in good condition, at least one piece of steel, properly sharpened, for churn drilling, on the section, to drill "down" rock with, in order to do away with any delays incident to waiting on arrival of an air compressor.

171. Examine the place where the men leave their buckets, extra clothing, do their shooting, etc., and designate a safe place for the workmen to eat their lunches, and spend their spare time.

172. It is the duty of the Assistant Foreman to see that every working place, and every place where cars are changed or left standing for a period of time, is equipped with an approved car stop, chain dog, or clevis. It is also part of the Assistant Foreman's duty to see that all broken car stops are taken out immediately to the shop for repairs or traded for a new one and

replaced on the track before the place is worked again.

173. It is the duty of the Assistant Foreman to see that all inexperienced men are placed with a safe, capable miner for a period of not less than 6 months for instructions in safety and mining by that miner.

174. It is the duty of the Foreman to keep extra track hammers and track tools in his tool house so that track crews can bring their damaged or unsafe tools there and exchange them for safe tools by Foreman's consent.

175. Foremen and Assistant Foremen shall not run motors or machines.

176. The Mine Foreman will keep a list of qualified motormen, brakemen, machine men and machine helpers in the main office at all times.

177. It is the duty of the Foreman and Assistant Foremen to check on low top that rakes off tops of cars and have this top drilled and shot immediately so as to eliminate loss of coal and the possibility of dust accumulation.

178. It is the duty of the Foreman to keep a record of Discipline Slips issued and of the action taken, and to see that all Assistant Foremen carry a book of these discipline slips and use them for *all* rule violations.

179. It is the duty of the Foreman and Assistant Foremen to give special instructions to men handling steel rails and long timbers.

180. It is the duty of the Assistant Foremen to check on the men's tools when they visit the working places and see that each man has full kit of tools in a safe, workable condition. Also to warn the men about carelessly leaving tools in a mine car or on top of mine cars which might go to the tipple or slate dump and cause serious trouble or delay to the tipple or slate dump or injuries to employees at these points, or to haulage crews.

181. Where it is necessary to have timbers removed or reset, the Assistant Foreman must be present to direct the moving and resetting of such timbers and make a careful examination before and after the timbers have been removed. Old timbers must be shot out when removed. Do not delegate this work to another workman.

182. The Assistant Foremen, on their respective sections, will be held accountable for accidents to machine men from falls of top whether they happen on night shift or day shift.

183. It shall be the duty of the Assistant Foreman to see that his motor or motors are equipped with approved rerailers, coupling pins, coupling link, and a hook and link in good condition, and well oiled before leaving the motor barn, and as often as possible while they are on the section.

184. It shall be the duty of the Mine Foreman and Assistant Foremen to make a written report of *all* injuries on the form required within 24 hours after the injury has occurred. Infraction of this rule will be cause for forfeiting Safety Bonus.

185. If the cut in any place "sets down" while machine is cutting, the Assistant Foreman will see that it is blocked by the machine crew while they cut the place.

Penalty for failure to observe any of the above rules will be immediate disciplinary action, which may be discharge for the first offense.

RULES FOR WIREMEN, BONDMEN AND REPAIRMEN

186. Always examine roof before beginning to work.

187. Care shall be taken to insure good mechanical construction and workmanship on all electrical installations.

188. Wiremen shall not work on "hot" lines of any kind without wearing tested rubber gloves and rubber shoes.

189. Sufficient hangers shall be used to keep all electrical circuits from touching rock, coal, or timbers at all times; and all wires installed shall be made tight and maintained accordingly.

190. All trolley wire through doors and over any place where men must pass under it shall be guarded.

191. At a point where a branch circuit leaves the main circuit there shall be placed a switch that can cut off all current from the branch circuit; these switches to be placed on both trolley and feeder lines.

192. Trolley wire must be hung not less than twenty inches outside of rail at No. 2 Mine and not less than twelve inches at No. 1 Mine, and must be as nearly parallel to it, both horizontally and vertically as is practical.

193. Give immediate attention to any defect you may see or have reported to you on live wires, wiring or bonding.

194. Telephone wires must be guarded where they cross over or under power lines.

195. Bondmen shall absolutely not attempt to put on a bond with arc weld machine without using a mask; and under no circumstances shall he leave nip of arc weld machine on wire when not using same for bonding with the idea of obtaining heat from the resistance.

196. Bonds must be placed on all new track before the trolley wire is put in service, and bonding must be properly maintained.

197. Trolley circuit rail returns shall be bonded at every rail joint and cross bonds inserted every 200 feet.

198. Feeder cables must be connected to trolley wire at intervals of 300 feet.

199. Repairmen shall be held responsible for the wiring, insulation and grounding of all equipment installed by them.

200. Connections to power lines, such as hoists, pumps, compressors, lights, or similar equipment, must be soldered, clamped, or a good mechanical

splice made; and each shall be properly fused and controlled with a starting resistance.

201. Motors must be properly oiled. They must not be over-oiled so that excess oil soaks fields and brush-holder wires.

202. Repairmen, after making repairs or inspection of any piece of equipment, shall be held responsible for the replacement of all bolts, nuts, studs and guards, and shall give special attention to the correct assembling of all equipment.

203. Repairmen and wiremen will be held responsible for tools required for their work and they shall be returned in good condition.

Penalty for failure to observe any of the above rules will be:

1st offense—warning.
2d offense—2 days lay off.
3d offense—5 days lay off, or discharge.

RULES FOR OUTSIDE AND SHOP

204. Motor or locomotive pits shall be kept covered or guarded by a guard rail when not in use.

205. Do not ascend a ladder unless you are certain it is safe and properly secured.

206. Do not attempt to place a belt on a running pulley.

207. You are forbidden to step over, across, or through a running conveyor belt.

208. Paper or greasy waste, rags, or other rubbish must not be allowed to accumulate. Do not burn rubbish near a building; always see that a fire is extinguished before you leave it. All scraps must be kept in a place designated for that purpose.

209. Tools, blocks, or other material must not be laid on overhead walks or cranes.

210. Guards must be placed on all gears and other places where required before starting machinery.

211. Do not reach or go under weight hanging on chain block.

212. Do not leave handle in a jack when holding weight. Do not place heavy material on ground or floor without putting blocks beneath to give clearance for hands and feet.

213. Goggles must be worn by employees when using emery wheels, lathes, drill presses, electric or acetylene welders, and babbitting or soldering with a ladle.

214. Do not use hammers or other tools with mushroom heads or broken or loose handles.

215. Planks or boards with nails protruding must not be left lying around.

216. All mine cars, motors, mining machines, pumps, haulage trucks and compressors must be properly blocked when making repairs.

217. Work must not be left until it is cleaned up or some arrangement made to see that it is cleaned up.

218. Do not allow acetylene torches to burn when not in use.

219. Loose clothing must not be worn by persons who are required to work around moving machinery.

220. Locomotive headlight bulbs shall not be supported by waste or any other combustible material.

Penalty for failure to observe the above rules will be;

1st offense—warning.
2d offense—2 days lay off.
3d offense—5 days lay off, or discharge.

RULES FOR TIPPLE

221. All men handling railroad cars must use a police whistle to give warning that the cars are in motion and must continue to give warning when they see anyone near the tracks or crossing the tracks.

222. All standing railroad cars placed above the tipple must have a sufficient number of brakes applied to safely hold the cars.

223. The application of brakes must always be on rear cars. The number of cars to be dropped at one time shall be limited to three.

224. The car dropper, whose duty it is to drop empty cars, must go to the rear end of the cars at the beginning of each shift and see that the proper number of brakes are applied to hold the

cars then on the side track. A positive stop block must be used on the first car standing above the tipple.

225. A buzzer or Claxon sounding apparatus must be installed and maintained at each tipple and sounded twice before any machine is started, allowing time enough between each sound for men to get in the clear before machinery is started.

226. All machinery must be so guarded as to protect operators or oilers, in the line of their duty, from injuries. Oiling and greasing while tipple is in operation is prohibited unless absolutely necessary in case of an emergency.

227. All guards must be in accordance with the approved standard.

228. Tipplemen are required to watch for all defective mine cars and mark same for repairs.

229. Jumping on loaded trips or walking upright or crawling over moving trips is absolutely prohibited.

230. Picking coal from around tipple, boiler houses, railroad cars, mine cars or slate dumps is prohibited.

231. Do not use telephone during a thunder storm any more than is absolutely necessary.

232. Walking on top edge of empty railroad car is absolutely forbidden.

233. The Tipple Foreman shall inspect fire-fighting equipment and keep in good condition

at all times. He shall see that the tipple and tipple tracks, including railroad tipple tracks, are kept clean and free from obstruction of any kind.

Penalty for failure to observe the above rules shall be:

1st offense—warning.
2d offense—2 days lay off.
3d offense—5 days lay off, or discharge.

RULES FOR HANDLING SUPPLIES

234. It is the duty of the Foreman and Assistant Foremen to see that all supplies taken into the mines are properly taken care of. If an excessive amount of supplies are taken in to complete a job, these excessive supplies must be promptly returned to the supply house where proper credit will be given.

235. The practice of allowing rails, jumpers, plates, and ties to lag behind in abandoned air courses, rooms, etc., is prohibited; and all such materials must be kept up with the working places.

236. Timbers, cap wedges, half-headers, and cross collars, being left behind in break-throughs, air courses and worked out rooms, is absolutely prohibited.

237. The practice of leaving spikes, bolts and plates lying in little piles on the gob is prohibited. Each Assistant Foreman shall have a central point on his section for the storing of such

supplies and shall maintain this station at all times.

238. Supplies, such as steel ties, pipe, and chain dogs that are damaged, shall be taken to the shop at once for repairs and not allowed to accumulate on the section.

239. The practice of using switch latch points for jumpers is prohibited.

240. It shall be the duty of the Assistant Foremen to see that all timbers set on their section are up to required specifications, and that all half-headers and cross collars are up to specifications with reference to diameter of timbers and thickness and shape of headers and collars.

241. All employees are requested to exercise care and economy in the use of materials and supplies; and employees will be discharged who, through carelessness or malice, waste material or destroy the property of the company or who are found stealing or carrying away such property.

Penalty for failure to observe the above rules shall be:

1st offense—warning.
2d offense—2 days lay off
3d offense—5 days lay off, or discharge.

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INSPECTOR

The Company Inspector will examine each mine for the purpose of seeing that the Mining Laws of Virginia and the Company Rules are carried out. The Inspector shall report to the Superintendent at the mine and the general office the condition of the mine at the time of the inspection. Should the Inspector find that the Assistant Foreman, or other foremen, are not enforcing the law and the safety rules, the guilty foremen shall be subjected to the same discipline as *any employee* who refuses to carry out the safety rules, with the exception that the foreman may be discharged on the first offense.

[fol. 884] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5246

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, An Unincorporated Association, Affiliated With the International Union, United Mine Workers of America, et al., Appellants,

versus

JEWELL RIDGE COAL CORPORATION, a Corporation, Appellee

Appeal from the District Court of the United States for the Western District of Virginia, at Roanoke

April 15, 1944, the transcript of record is filed and the cause docketed.

Same day, the appearance of Crampton Harris, Frank W. Rogers and Leonard G. Muse is entered for the appellants.

Same day, certified transcript of the record for use on a petition for a writ of certiorari is furnished Crampton Harris, Esq., counsel for appellants.

April 18, 1944, the appearance of George Richardson, Jr., is entered for the appellee.

April 21, 1944, the appearance of Wm. A. Stuart is entered for the appellee.

Same day, application of the parties, by their respective [fol. 885] counsel, for a stay of proceedings pending application in the Supreme Court for a writ of certiorari is filed.

ORDER STAYING FURTHER PROCEEDINGS—Filed April 24, 1944

Style of Court and Title Omitted

Upon the Joint Application of the parties, by their respective counsel, and it appearing that the appellants are making application in the Supreme Court for a writ of certiorari to this Court in this case,

It Is Now Here Ordered, that further proceedings in this Court in the above entitled case be, and the same are hereby stayed pending final action of the Supreme Court

on the said application of the appellants for a writ of certiorari.

April 22, 1944.

John J. Parker, Senior Circuit Judge.

May 8, 1944, certificate of Clerk of the Supreme Court of the United States evidencing the filing of petition for a writ of certiorari and the docketing of the case in that Court on May 6, 1944, is filed.

CERTIFIED COPY OF ORDER OF THE SUPREME COURT OF THE UNITED STATES DENYING PETITION FOR A WRIT OF CERTIORARI—Filed June 1, 1944

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1943

No. 969

LOCAL No. 6167, UNITED MINE WORKERS OF AMERICA. An Unincorporated Association Affiliated With the Inter- [fol. 886] national Union, United Mine Workers of America, et al., Petitioners,

vs.

JEWELL RIDGE COAL CORPORATION

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

On Consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Fourth Circuit, and of the argument of counsel thereupon had, it is now here ordered by this Court that the said petition be, and the same is hereby denied.

May 29, 1944.

A True copy. Test:

Charles Elmore Cropley, Clerk of the Supreme Court of the United States, By Hugh W. Barr, Deputy. (Seal of the Supreme Court.)

June 10, 1944, notice of and motion of appellee to set case for hearing at June term, 1944, are filed.

June 21, 1944, twenty-five printed copies of volumes I and II of the transcript of record are filed.

Same day, brief on behalf of the appellants is filed.

PETITION OF SOUTHERN COAL PRODUCERS ASSOCIATION, A COR-
[fol. 887] PORATION, FOR LEAVE, AS AMICUS CURIAE, TO FILE BRIEFS AND TO PRESENT ORAL ARGUMENT—Filed June June 23, 1944

Style of Court and Title Omitted

Southern Coal Producers Association, a Corporation, petitions the Court for leave to appear, by its counsel, as *amicus curiae* in this action and to file briefs and present oral argument.

In support of said petition, petitioner says that:

The Southern Coal Producers Association represents numerous operators of bituminous coal mines in the Southern Appalachian area similarly situated to the appellee herein.

The numerous bituminous coal mine operators represented by petitioner have controversies similar to that presented in this action.

Jewell Ridge Coal Corporation, appellee in this action, is a member of the Southern Coal Producers Association.

The District Court of the United States for the Western District of Virginia ordered that the Southern Coal Producers Association be granted leave to participate, by its counsel, in the trial of this action before it, and to argue the same, and to file briefs therein, as *amicus curiae*.

[fol. 888] Wherefore, said Southern Coal Producers Association prays that this Court permit the Association, through its undersigned counsel, to submit briefs and participate in oral argument in this proceeding.

Southern Coal Producers Association, a Corporation, By its Counsel: Edward R. Burke, 515 Southern Building, Washington, D. C.; John C. Gall, 701 Southern Building, Washington, D. C.

Letter of June 19, 1944, to the Clerk

DEAR MR. DEAN:

Referring to the petition of Southern Coal Producers' Association for leave as amicus curiae to file briefs and to present oral argument, we write to say that the appellee does not object.

Yours very truly, Wm. A. Stuart, George Richardson, Jr., Counsel for appellee.

Telegram of June 15, 1944, to the Clerk

Re United Mine Workers of America versus Jewell Ridge Coal Corporation Appellants have no Objection to Motion of Southern Coal Producers Association to be [fol. 889] Allowed to File Brief as Amicus Curiae Crampton Harris Attorney United Mine Workers of America.

ORDER PERMITTING SOUTHERN COAL PRODUCERS ASSOCIATION TO FILE BRIEF AND MAKE ORAL ARGUMENT AS AMICUS CURIAE—Filed and Entered June 23, 1944

(Style of Court and Title Omitted)

Upon the Petition of Southern Coal Producers Association, a Corporation, by its counsel, Edward R. Burke and John C. Gall, and it appearing that a copy of the petition has been forwarded to counsel for the respective parties, and there being no objection to the granting of the petition,

It is Now Here Ordered by this Court that the Southern Coal Producers Association, a Corporation, be, and it is hereby, permitted to file a brief as amicus curiae and participate in the oral argument in the above entitled case.

June 23, 1944.

John J. Parker, Senior Circuit Judge.

June 26, 1944, brief and appendix on behalf of the appellee are filed.

Same day, brief on behalf of Southern Coal Producers Association as *amicus curiae* is filed.

[fol. 890] ARGUMENT OF CAUSE

June 28, 1944, (June term, 1944) cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

[fol. 891] OPINION—Filed October 6, 1944

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5246

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, an unincorporated association, affiliated with the International Union, United Mine Workers of America; et al., Appellants,

versus

JEWELL RIDGE COAL CORPORATION, a Corporation, Appellee

Appeal from the District Court of the United States for the Western District of Virginia, at Roanoke

(Argued June 28, 1944. Decided October 6, 1944)

Before Parker, Soper and Dobie, Circuit Judges

Crampton Harris (Welly K. Hopkins, Frank W. Rogers and Leonard G. Muse on brief) for Appellants; Georges [fol. 892] Richardson, Jr., and William A. Stuart (Penn, Stuart & Phillips, and Richardson & Kemper on brief) for Appellee; and John C. Gall (E. R. Burke on brief) for Southern Coal Producers Association, as amicus curiae.

PARKER, Circuit Judge:

This is an appeal in a suit instituted to obtain a declaratory judgment to the effect that the Fair Labor Standards Act of 1938 does not require that "travel time" from "portal to portal" be included in the "work week" of miners in bituminous coal mines. Plaintiff is the owner and operator of two mines in western Virginia employing around 900 miners. It brought a class action against two local unions of the United Mine Workers of America and certain of their officers and members. An answer filed on behalf of the defendants denied plaintiff's right to the relief asked and by way of counterclaim asked recovery under the Fair Labor Standards Act for additional wages for work done between April 1, 1943 and June 20, 1943. The District Court rendered judgment for plaintiff and the defendants have appealed. The facts are fully stated in the opinion of the District Court. *Jewell Ridge Coal Corporation* v. *Local No.* 6167 *etc.* 53 F. Supp. 935.

In view of the long established custom in the coal industry not to include travel time in the work week, the collective bargaining contracts extending over a long period recognizing the "face to face" basis of pay, the testimony [fol. 893] before the committees of Congress, the reason and purpose of the Fair Labor Standards Act and the probable effects and consequences of construing the act to require travel time in bituminous coal mines to be included in the work week, there is strong reason for thinking, as everyone connected with the matter seems to have thought until recently, that it was not the intent of Congress that the act should be so construed in its application to the coal mining industry. The reasons in support of this conclusion are fully and ably set forth in the opinion of the learned judge below and need not be repeated. They would be convincing, were it not for the decision of the Supreme Court in *Tennessee Coal Iron & R. Co.* v. *Muscoda Local No.* 123 *etc.* —— U. S. ———, 64 S. Ct. 698, which we do not think can be distinguished in principle from the case at bar.

A distinction is attempted on the ground that the travel time involved in the *Muscoda case* involved travel in an iron mine and the trial judge had found that it was properly includ[illegible] the work week, whereas the travel time here involved is in a coal mine and the trial judge has found it not properly included. This, however, is a distinction without a difference. The record leaves no doubt that travel to the working face in a coal mine is substantially the same sort of thing as travel to the working face in an iron mine; and, while the Supreme Court in the case before it made reference to the findings below, it is clear from the opinion that, irrespective of the findings, the court was of opinion that travel of the sort here involved should be considered work within the meaning of [fol. 894] the statute and included within the work week. The court said in this connection:

"We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner. Accordingly we view Sections 7 (a)

3 (g) and 3 (j) of the Act as necessarily indicative of a Congressional intention to guarantee either regular or overtime compensation for all actual work or employment. To hold that an employer may validly compensate his employees for only a fraction of the time consumed in actual labor would be inconsistent with the very purpose and structure of those sections of the Act. It is vital, of course, to determine first the extent of the actual work week. Only after this is done can the minimum wage and maximum hour requirements of the Act be effectively applied. And, in the absence of a contrary legislative expression, we cannot assume that Congress here was referring to work or employment other than as those words are commonly used—as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.

"Viewing the facts of this case as found by both courts below in the light of the foregoing considerations, we are unwilling to conclude that the underground travel in petitioners' iron ore mines cannot be construed as work or employment within the meaning of the Act. The exacting and dangerous conditions in the mine shafts stand as mute, unanswerable proof that the journey from and to the portal involves continuous physical and mental [fol. 895] exertion as well as hazards to life and limb. And this compulsory travel occurs entirely on petitioners' property and is at all times under their strict control and supervision.

"Such travel, furthermore, is not primarily undertaken for the convenience of the miners and bears no relation whatever to their needs or to the distance between their homes and the mines. Rather the travel time is spent for the benefit of petitioners and their iron ore mining operations. The extraction of ore from these mines by its very nature necessitates dan-erous travel in petitioners' underground shafts in order to reach the working faces, where production actually occurs. Such hazardous travel is thus essential to petitioners' production. It matters not that such travel is, in a strict sense, a non-productive benefit. Nothing in the statute or in reason demands that every moment of an employee's time devoted to the service of his employer shall be directly productive. Section 3(j) of the

Act expressly provides that it is sufficient if an employee is engaged in a process or occupation necessary to production. Hence employees engaged in such necessary but not directly productive activities as watching and guarding a building, waiting for work, and standing by on call have been held to be engaged in work necessary to production and entitled to the benefits of the Act. Iron Ore miners traveling underground are no less engaged in a 'process or occupation' necessary to actual production. They do more than 'stand and wait'. *Missouri, K. & T. R. Co.* v. *United States* 231 U. S. 112, 119, 34 S. Ct. 26, 27, 58 L. Ed. 144, Cf. *Bountiful Brick Co.* v. *Giles* 276 U. S. 154, 158, 48 S. Ct. 221, 222, 72 L. Ed. 507, 66 A. L. R. 1402. Theirs is a fossorial activity, bearing all the indicia of hard labor."

That the decision of the Court was understood by the Court itself to be based upon the underlying facts of the [fol. 896] case and not merely upon the interpretation which the lower courts had placed upon those facts, is shown by the concurring opinions, which stressed the interpretation made in the findings of the lower courts. If the interpretation of the facts in these findings had been the controlling consideration in the majority opinion, there would, of course, have been no occasion whatever for the concurring opinions. Furthermore, where the facts of two cases are substantially the same, the law should not be applied differently because trial judges have looked at them in a different way. The record shows that travel in an iron mine is the same sort of thing as travel in a coal mine. The findings of the trial courts as to whether upon the basic facts travel time was part of the work week within the meaning of the statute were mere conclusions involving mixed questions of law and fact; and, the basic facts being the same, an appellate court cannot distinguish cases on the basis of such conclusions. In such case, the difference in conclusions involving mixed questions of law and fact is necessarily attributable to a difference in views as to the law or its application.

Equally vain is the attempt to distinguish the Supreme Court's decision on the ground that no such custom or bargaining agreements existed in the case of the mining of ore as are shown in the case before us. The Supreme Court decided the point on two grounds: (1) that the custom and agreements relied on were not sufficiently shown, and (2)

that they were immaterial in any event. After commenting on the failure of the lower court to find "immemorial" custom or collective bargaining agreements and saying that [fol. 897] the lower court's findings with regard thereto were not so clearly erroneous as to require that they be disregarded, the Supreme Court went on to say:

"But in any event it is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the workweek or not to compensate employees for certain portions of their work. The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him for only a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights."

And in a note to the passage above quoted, the Court said:

"Congress was not unaware of the effect that collective bargaining contracts might have on overtime pay. It expressly decided to give effect to two kinds of collective agreements, as specified in Section 7(b) (1) and (2) of the Act. Cf. Section 8(c). It thus did not intend that other collective agreements should relieve employers from paying for overtime in excess of an actual workweek of 40 hours, regardless of the provisions of such contracts."

What the majority of the court has thus so clearly said we are not at liberty to ignore. It is no answer that the case might have been decided on the ground that the evidence as to custom and contract was insufficient. The court chose to place its decision on the additional ground that [fol. 898] custom and contract were immaterial; and it is settled beyond controversy that in such case the decision is binding authority as to both of the grounds upon which it is based. *Richmond Screw Anchor. Co* v. *United States* 275 U.S. 331, 340; *United States* v. *Title Ins. Co.* 265 U.S., 472, 486; *Union Pac. R. Co.* v. *Mason City Co.* 199 U.S. 160, 166; 14 Am. Jur. 298.

Nor is anything said in the concluding paragraph of the Supreme Court's opinion upon which a distinction can be based. This is not a case "where precisely accurate computation is difficult or impossible", nor is it one of the "borderline cases where the other facts give rise to serious doubts as to whether certain activity or non activity constitutes work or employment". Cf. dissenting opinion of Judge Sibley in the *Muscoda case* 135 F. 2d at 323. What is involved is just the sort of activity as was held by the Supreme Court to "leave no uncertainty" as to its character as "work".

Under the circumstances, there is nothing for us to do but reverse the decision below. If it is thought that the decision of the Supreme Court should be overruled or limited so as not to apply to a case of this character, that is a matter for the Supreme Court and not for us.

The disturbing effect of the decision here will not be so great as it otherwise would, in view of the fact that, by agreement between the miners and operators, the portal to portal system of computing the work week has now been adopted in the industry. An amended answer filed in the cause waives the right to additional wages due under the act prior to April 1, 1943, the date of the expiration of the [fol. 899] contract between the union and the operators; and the amount claimed as additional wages between April 1st and June 20th, 1943, is only the amount voluntarily awarded the workers in other mines as a result of the settlement arrived at when the "portal to portal" basis was adopted. The mines of plaintiff were excluded from the terms of that settlement, as we understand, so that the right to an adjudication of the questions here involved would not be affected.

For the reasons stated, the judgment appealed from will be reversed and the cause will be remanded for further proceedings not inconsistent herewith.

Reversed.

SOPER, Circuit Judge, dissenting:

If certain statements in the opinion in *Tennessee Coal Co.* v. *Muscoda Local*, 321 U.S. 590 are viewed apart from their setting, a reversal of the judgment in the pending case in favor of the mine operators may perhaps be logically deduced; but a reversal will produce a result so inequitable

that we may well inquire whether we should not discard formality and adopt a realistic attitude in resolving the issue, as we are admonished to do in cases of this sort in the opening sentences of that opinion.

[fol. 900] In the pending coal mine case, unlike the *Tennessee case* where conditions in iron ore mines were under consideration, it was found by the District Court upon undisputed evidence that "by the universal custom and usage of the past fifty years and by agreement of the parties in every collective bargaining agreement that was ever made, it was universally recognized that in the bituminous coal industry travel time was not work time". In short, the court found that in the coal mining industry the term "workweek" had come to have the definite meaning of time spent at work at the face of the mine exclusive of travel time; and from this finding the conclusion naturally followed that the term should be given this significance in the application of a statute which does not define the term at all.

This conclusion is now said to be erroneous because in the later decision in the Tennessee case, where the District Court had failed to find any such immemorial custom or collective bargaining agreements, the Supreme Court said, (p. 602), that "in any event it is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the work week." While this language was used with respect to the different conditions then prevailing in the metal mining industry, it is now taken to mean that custom or contract, no matter how long or how firmly established, must be disregarded in fixing the limits of the work week in all industries.

This line of reasoning produces such an injustice in the pending case that I am loath to believe that it represents a correct interpretation of the statute or the conclusion which the Supreme Court itself would reach if the pending [fol. 901] case were before it. In this case we do not have the picture portrayed in the opinions in the earlier suit of miners struggling against difficulties to obtain the best terms they could get and making repeated unsuccessful attempts to be paid in whole or in part for travel time, where in short travel time was not excluded from work time with the miners' free and uncoerced consent, and the District Court consequently found that there was no custom so

well established that Congress must have adopted it or had it in mind when it used the term "workweek" in the statute. Nor do we have such a decision as that rendered by the Administrator of the Wage and Hour Division of the United States Department of Labor on March 15, 1941 in respect to the metal mining industry that work time starts when the miner reports for duty at the collar of the mine and ends when he reaches the collar at the end of the shift. See 40 F. Supp. 7, 8, 10; 135 F. 2d 322, 323, and 321 U. S. 601.

Quite the contrary has been the situation in the coal mining industry. Not only was there a custom of fifty years' standing, repeatedly embodied in successive collective bargaining agreements, but the custom had the affirmative approval of the powerful union known as the United Mine Workers of America which had been eminently successful in representing the miners' interests. The "face to face" basis for the computation of working time has been traditional in the industry. When the Code of Fair Competition under the National Industrial Recovery Act was drawn up for the industry by representatives of the operators and [fol. 902] of the United Mine Workers and approved by the President of the United States in 1933, it provided that the work day should consist of seven hours' work at the face of the mine. Basic wage agreements for the industry executed by the operators and by the union in 1934, 1935 and 1937 incorporated this provision. Even after the Fair Labor Standards Act passed on June 25, 1938 had become effective in accordance with its terms on October 23, 1938, the same provision was retained in the basic agreement of May 12, 1939 for the period of two years; and it was repeated in a succeeding two year agreement executed on April 1, 1941.

It must not be supposed that this method of computing wages was imposed upon an unwilling union by the superior power of management. It was deemed by both parties to be beneficial to their respective interests as a practical solution of the perplexing questions which would otherwise arise in applying a general wage agreement to a large number of mines in which the travel time necessarily varied on account of diverse physical conditions. This was strikingly shown in 1940 in the course of an investigation of the industry by the Office of Wage and Hour Administration when the representatives of the operators and the representa-

tives of the union on July 9, 1940 united in a letter urging the administration to recognize the traditional contract provision as conforming to the statute. They pointed out that the wage agreements in effect afforded "the highest standards of labor provided in any industry in the United States both as to hours of working time and wages paid"; and they expressed the opinion that the adoption of the "portal to portal" system "would create so much confu-
[fol. 903] sion in the bituminous coal industry as to result in complete chaos." The administration acceded to this view and on July 18, 1940 gave out the opinion that "the practice of computing working time on a face to face basis in the bituminous coal industry would not be unreasonable." It was under this state of affairs that the two year agreement of April 1, 1941 was executed.

It was not until March, 1943, during the negotiations for a new contract to take effect April 1, 1943, that the union suggested that in order to conform with the basic and legal requirements for the industry the maximum hours and working time provisions of the contract should be so phrased as to establish portal to portal for starting and quitting time for all underground workers. But even then it was obvious that the portal to portal basis was proposed in order to justify a flat $2 a day wage increase for all workers because the increase was demanded for all classifications of outside as well as inside day men.

The negotiations were not successful although prolonged conferences were held in an effort to reach an agreement and the dispute was referred to the War Labor Board. There were strikes which resulted in the seizure of the mines by the federal government and intermittent work periods during which the industry operated under the conditions specified in the 1941 agreement. Finally the Secretary of the Interior, representing the government, and John L. Lewis, representing the miners, reached an agreement on November 3, 1943 which included the portal to portal method of measuring work time. Subsequently the greater part of the industry yielded and entered into agreements [fol. 904] on the lines of the Ickes-Lewis agreement.

This change of front on the part of the miners for bargaining purposes, when making an agreement for future operations, could not affect the condition which formerly existed in the industry or transform into work time that

which was not work time in the generally accepted meaning of the term that had prevailed in the industry for a long time when the statute was passed and that continued to prevail with administrative sanction for five years after its enactment. The statute could not have one meaning in the earlier and another meaning in the later period; and the Mining Company was justified in resisting in this suit the application of the portal to portal method of computation for work done by the miners even after the 1941 agreement had expired.

It seems a mistake to suppose that under no circumstances can custom or agreement throw any light on the meaning of the Act in its bearing upon an industry. The language of the Supreme Court in the Tennessee case should not be given this sweeping significance as the decisions of the courts tend to show. For example, it was held in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, that in the statutory sense the regular rate of pay for any particular week is the quotient of the amount paid per week divided by the number of hours worked in that week, and that overtime must be calculated on this basis, and that unless this is done, it is not sufficient that the wages actually paid exceed the statutory minimum; but, on the other hand, it was held in *Walling* v. *Belo Corp.*, 316 U. S. 624, that an employer could continue to pay his employees the same weekly salaries [fol. 905] without violating the Act because he rearranged the basis of compensation by an agreement which provided for a basic rate of pay per hour for the maximum hours fixed by the Act and one and a half times that rate per hour for overtime together with a guarantee that the employee should receive each week for regular time and overtime not less than a stipulated amount. In view of these decisions, it is obvious that the legality of rate of pay may depend upon an agreement of the parties.

It is suggested in mitigation of the harsh effect of a decision adverse to the Mining Company that the amount claimed by the miners in this case has been limited, by amendment of the counterclaim, to the period beginning April 1, 1943 and ending June 20, 1943. Indeed it is assumed in the briefs that each miner's claim is limited to the sum of $40 and that the total sum involved is approximately $40,000. These statements cannot be verified in the record. The amendment to the counterclaim is not limited to the

period ending June 20, 1943 but contains merely the assertion that the miners will not further assert their claims to travel time prior to March 31, 1943. The end of the period for which the claim is made is not stated; nor is the amount of the claim defined. The assumed limitation of the period to June 20, 1943 and to the sum of $40 per miner seems to be based on the terms of agreements entered into between the union and other mining corporations; but so far as the record discloses, the Jewell Ridge Coal Corporation has never entered into a new agreement or paid for travel time. If a claim is asserted for the full amount due under the Act, [fol. 906] as now interpreted by the miners, a very much larger sum than $40,000 will be involved in this controversy.

Moreover, the decision may be of grave importance in its application to other mine owners who have not dealt with the union or have not signed wage agreements. If the new interpretation of work time is applied to them over the period that has elapsed since the passage of the Act, subject only to local statutes of limitations, and double payment is exacted under the penal sections of the Act, it may be that the mine owners will be subject to losses of huge amounts. Indeed the decision might prove even more sweeping in its effect for it might invalidate the compromise provisions respecting pay for travel time and liquidated damages that form part of contracts between the mine owners and the union in a large part of the industry. If portal to portal pay is required under the Act as a matter of law, such settlements are not binding if the amount paid is less than the actual wages due under the Act; and the mine owners would become liable not only to make up the deficiency but to pay an equal amount in addition as liquidated damages. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572. See also, *Guess* v. *Montague*, 4 Cir., 140 F. 2d 500; *Fleming* v. *Warshawsky & Co.*, 7 Cir., 123 F. 2d 622; *Johnson* v. *Dierks Lumber & Coal Co.*, 8 Cir., 130 F. 2d 115; *Rigopoulon* v. *Kervan*, 2 Cir., 140 F. 2d 506; *Birbalas* v. *Cuneo Printing Industries, Inc.*, 7 Cir., 140 F. 2d 826.

These considerations give force to the conclusion that Congress could not have intended to compel mine owners to pay large increases in wages over and above those specified in prevailing agreements, and also to inflict upon the [fol. 907] mine owners additional sums in the nature of a penalty by giving to the term "work week," as used in the

statute, a significance contrary to that which by voluntary agreement and by long continued custom had prevailed in the industry.

[fol. 908] JUDGMENT

Filed and Entered October 6, 1944.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5246

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, an unincorporated association, affiliated with the International Union, United Mine Workers of America; et al., Appellants,

vs.

JEWELL RIDGE COAL CORPORATION, A Corporation, Appellee

Appeal from the District Court of the United States for the Western District of Virginia

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of Virginia, at Roanoke, for further proceedings not inconsistent with the opinion of the Court filed herein.

[fol. 909] October 6th, 1944.

John J. Parker, Senior Circuit Judge.

ORDER STAYING MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI—Filed November 6, 1944

[Style of Court and Title Omitted]

Upon the Application of the Appellee, by its counsel, and for good cause shown,

It Is Ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed

pending the application of the said Appellee in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided said application is filed in the said Supreme Court within 30 days from this date.

November 4th, 1944.

John J. Parker, Senior Circuit Judge.

[fol. 910] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing three (3) volumes is a true copy of the entire record and proceedings in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals, made up in accordance with the directions of counsel for the appellee, for use in the Supreme Court of the United States on an application for a writ of certiorari.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 7th day of November, A. D., 1944.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit. (Seal.)

[fol. 911] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 2, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 721

JEWELL RIDGE COAL CORPORATION, a Corporation, *Petitioner,*

v.

LOCAL No. 6167, UNITED MINE WORKERS OF AMERICA, an Unincorporated Association, Affiliated with the International Union, United Mine Workers of America, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. ———.

JEWELL RIDGE COAL CORPORATION, a Corporation, *Petitioner,*

v.

LOCAL No. 6167, UNITED MINE WORKERS OF AMERICA, an Unincorporated Association, Affiliated with the International Union, United Mine Workers of America, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Jewell Ridge Coal Corporation, appellee in the Circuit Court of Appeals for the Fourth Circuit, hereby prays that a writ of certiorari issue to review a judgment of that Court, entered on the 6th day of October, 1944, with accompanying opinion by Judge Parker concurred in by Judge Dobie and dissenting opinion by Judge Soper, reversing a judgment of the District Court of the United

States for the Western District of Virginia entered on the 25th day of January, 1944.

Petitioner annexes hereto a brief in support of this petition, and adds for convenient reference, as an appendix, copies of the opinions of the Circuit Court of Appeals and of the District Court below, as well as the opinions of this Court and of the Circuit Court of Appeals for the Fifth Circuit and of the District Court in the case of *Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local No. 123, etc.*

All italics are petitioner's unless otherwise noted.

For brevity, the Fair Labor Standards Act of 1938, 52 Statutes at Large 1060-9, 29 U. S. C. A. 201-219, will be called the Act; the Administrator of the Wage and Hour Division of the United States Department of Labor will be called the Administrator; International Union, United Mine Workers of America will be called the Union; and the case of *Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local No. 123, etc.*, will be called the Muscoda Case.

A. JURISDICTION.

The jurisdiction of this Court is based on section 240 (a) of the Judicial Code, 28 U. S. C. A. 347, as amended by the Act of February 13, 1925.

B. STATEMENT OF THE MATTER INVOLVED.

I. The Pleadings and the Proceedings in the Case.

This is an action under the Federal Declaratory Judgment Act, section 274 (d) of the Judicial Code, 28 U. S. C. A. 400, as amended, instituted July 30, 1943, by petitioner against its underground workers as a class and the International Union, United Mine Workers of America, their representative in collective bargaining, to obtain judicial construction of the Act for the purpose of determining whether the word "workweek" as used in section 7 of the Act includes, by force of law, the time spent by the employees in traveling underground to and from their usual working places in petitioner's mines.

Because of the importance of the question to this major national industry, this case has received considerable publicity under the designation of the "Portal to Portal Case." It was previously before this Court, during the October Term, 1943, upon petition of respondents herein for a writ of certiorari before the Circuit Court of Appeals for the Fourth Circuit had heard the case. This Court denied that petition by order entered on May 29, 1944.

Petitioner is engaged in the business of operating two mines, employing about nine hundred men in all, in the bituminous coal mining industry.

The complaint alleged, and the proof established, that at petitioner's No. 1 mine the average underground travel time per underground employee was 88 minutes per working day, and at No. 2 mine 67.1 minutes, involving a total of 765 underground employees, for none of which travel time had payment ever been demanded or made. This indicates a formidable potential liability under the Act, and if projected to the entire bituminous coal mining industry, would make a sum of vast amount. The vital importance of the case on that score both to petitioner and to the industry is obvious without elaboration. The question presented is of equally great importance to petitioner, and to the industry, upon the score of maintenance of future competitive position, as will be pointed out hereinafter.

Petitioner in its complaint asked the Court to declare among other things that:

> "(a) Plaintiff, in computing the workweek of its underground employees on the basis of hours of work in the mines at the usual working places, exclusive of the lunch period and travel time, as provided in the effective wage agreements, and in paying its underground workers for their services on that basis, had complied with and discharged the obligations imposed upon it by Section 7 of the Fair Labor Standards Act."
>
> "(b) Section 7 of the Act does not require that there be included within the workweek of underground workers in plaintiff's mines time spent in travel from the portal to their usual working places and return."

The defendants by joint answer asserted that petitioner's underground employees had been employed for workweeks longer than those prescribed in section 7 of the Act and had not been paid for all of their working time as required by the Act. They filed a counterclaim in behalf of themselves and all other employees similarly situated claiming for the entire period subsequent to the effective date of the Act (October 24, 1938) the overtime compensation, liquidated damages and attorney's fee provided by the Act. Before the trial began, defendants filed an amendment to their counterclaim disclaiming the compensation and liquidated damages applicable to the period preceding April 1, 1943.

On January 25, 1944, the District Court entered judgment declaring:

> "1. That the Fair Labor Standards Act of 1938 does not require that there be included within the workweek of underground workers in plaintiff's mines, either time spent by such employees outside the portal of the mines before entering therein, or time spent in traveling from the portals to their usual places of work and return; and
>
> "2. That plaintiff, in computing the workweek of its underground employees on the basis of hours of work in the mines at their usual working places, exclusive of the lunch period, and the time spent outside the portals, and travel time from the portals to their usual working places and return, as provided in the effective wage agreements and continuations thereof, and in paying its underground workers for their services on that basis, has complied with and discharged all its obligations imposed upon it by the Fair Labor Standards Act of 1938" (R. p. 578).

The carefully considered opinion of the District Court appears in the record, pp. 543-576, is reported in 53 F. Supp. 935, and appears in the appendix to this petition (pp. 43-79).

From the judgment of the District Court respondents appealed to the Circuit Court of Appeals for the Fourth Circuit, which on the 6th day of October, 1944, by a divided Court, reversed the case (App. pp. 80-92).

II. Summary Statement of the Facts.

The following are the chief pertinent facts shown in evidence and found by the District Court:

1. Petitioner's mines had always been operated on the "face to face" basis of measuring working time, i.e., working time was measured by the hours worked by the particular employee at his usual working place exclusive of travel time (App. p. 49).

2. The face to face basis was traditional in the bituminous coal mining industry, and had been used in all the successive wage agreements negotiated by the employers in the industry over a period of at least fifty years through collective bargaining with the employees represented by the Union, a "strong and powerful" labor organization (App. p. 50, 70).

3. The face to face basis was written into the Code of Fair Competition made in 1933 for the bituminous coal mining industry in conference with the representatives of the Union and of the employers, and approved by the President of the United States, pursuant to the provisions of the National Industrial Recovery Act (App. p. 50).

4. The face to face basis had been consistently followed throughout the industry down to the date of institution of this action (App. p. 50).

5. The legislative history of the Act as contained in the evidence taken by the committees, the committee reports and the debates, shows, as found by the District Court below, that it was not the intention of Congress nor the expectation of the industry that the Act should "interfere in any way with the wage structure of the bituminous coal mining industry" (App. p. 60-1), but just the contrary, and that it was not the desire of either the Union or the employers that it should so interfere.

6. Upon passage of the Act neither employers nor the Union saw in it anything requiring a departure from the face to face basis, and both continued, after the Act became effective, to make wage agreements on that basis just as before (App. p. 50).

7. The question whether travel time is required by the Act to be included in the workweek was first raised in pursuance of a routine inspection of a Pennsylvania company made by field representatives of the Administrator. The question was exhaustively examined and considered by the Administrator and his field and legal staff over a period of several months. Representatives of employers and of the Union from time to time urged upon the Administrator the importance to the industry of leaving the face to face basis undisturbed, and finally joined in a strongly phrased written representation under date of July 9, 1940 ("the Houck Letter") to that end (App. p. 75-9). The Administrator upon the basis of his thorough investigation and consideration of the question *issued an administrative ruling that under the facts of the history and conditions of this particular industry, which he found to present "a unique situation"* (R. p. 694), *the face to face basis was allowable.*

8. The economy of the industry, its wage structure, its freight rates, the ability of its units to survive under competitive conditions, are all inseparably joined with the face to face basis, and a departure therefrom would under conditions of normal competition have disastrous consequences, so much so as

> "* * * to result in complete chaos * * * and the very purpose of the Fair Labor Standards Act would be defeated * * *. This would be a most unhappy result to flow from an Act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and high rates of pay in the bituminous coal mines" (joint written statement of Union and operators to Administrator, July 9, 1940, App. p. 52).

9. The Union's supposed demand in March, 1943, for a shift to the portal to portal basis, i. e., payment for all the time employees spend after entering the portal of the mine until they emerge therefrom less only the lunch period, was, as found by the District Court below, "actually a demand for a flat wage increase to all mine workers, whether or not they spent any time traveling underground" (App. p. 54-5), and was advanced solely in an effort to evade the obstacles to the desired wage increase presented by the National Wage Stabilization Program. The demand did not include any request for payment for travel time as such.

10. Underground travel in petitioner's mines, as found by the District Court below, presents "no such painful and burdensome conditions as those described in the iron ore mines" (App. p. 71), thus indicating that in the bituminous coal mining industry a powerful union and genuine collective bargaining had succeeded in effecting improved conditions incidental to underground travel, as well as to other conditions of employment. The District Court below found as a fact that underground travel time in petitioner's mines was not worktime within the requirements of the Act.

11. If petitioner were now held liable for back pay and overtime and statutory damages on account of past failure to include travel time in the workweek, the result, even after applying the Virginia 3-year statute of limitations, would produce a "great amount of money" (Houck letter, App. p. 78), estimated at a million dollars, as potential liability. If this sum with respect to petitioner, a comparatively small unit in a major national industry, is projected to the industry as a whole, the ruinous possibilities are at once apparent, as pointed out in the minority opinion of the Circuit Court of Appeals (App. p. 92). Even if it be assumed that the voluntary disclaimer of all amounts applicable to the period prior to April 1, 1943, made by respondents in their amended counterclaim (thus reducing the period of potential liability to that from April 1, 1943, to

November 3, 1943—date of Ickes-Lewis Agreement, which adopted the portal to portal plan of computing working time) is enforceable against petitioner's employees, there would still remain a potential claim against petitioner estimated at three hundred thousand dollars, with a correspondingly large projection as to the industry as a whole.

12. The fact that the industry has been operating upon the portal to portal basis since the Ickes-Lewis Agreement became effective on November 3, 1943 (R. p. 793-5), under war-time absence of competitive conditions, does not, as the majority opinion of the Circuit Court of Appeals seems to assume (App. p. 86), provide any insurance against the calamitous effect of portal to portal when competitive conditions return after the war. The contrary is established by the uncontradicted testimony in this case—

> "* * * the industry and the United Mine Workers will, after competitive conditions return, have to back away from this portal to portal thing in order to insure the maintenance of competition between operators and to insure maintenance of work for their own people" (R. p. 145).

III. The Decision of the Circuit Court of Appeals.

In the majority opinion of the Circuit Court of Appeals it is said:

> *"In view of the long established custom in the coal industry not to include travel time in the work week, the collective bargaining contracts extending over a long period recognizing the 'face to face' basis of pay, the testimony before the committees of Congress, the reason and purpose of the Fair Labor Standards Act and the probable effects and consequences of construing the Act to require travel time in bituminous coal mines to be included in the work week, there is strong reason for thinking,* as everyone connected with the matter seems to have thought until recently, that it was not the intent of Congress that the Act should be so construed in its application to the coal mining industry. The reasons in support of this conclusion are fully and

> ably set forth in the opinion of the learned judge below and need not be repeated. *They would be convincing,* were it not for the decision of the Supreme Court in *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123 etc.* .... U. S. ...., 64 S. Ct. 698, which we do not think can be distinguished in principle from the case at bar" (App. p. 81).

This necessarily means that the court was of opinion to sustain the Administrator and the District Court and affirm the case, and would have done so but for certain general language (App. p. 141-2) *contained in the opinion of this Court in the Muscoda decision.* That language the Court deemed to be as applicable to the bituminous coal mining industry as to the iron mining industry. Yet this Court, in deciding the Muscoda Case, did not have before it the facts of the history and conditions of petitioner's mines or of the coal mining industry. *The situation therefore is that petitioner was not accorded a judicial review of its own case by the Circuit Court of Appeals, but that court determined petitioner's rights solely by reference to a different case dealing with a different industry and involving a different state of facts. The findings of fact of both the Courts below are wholly in petitioner's favor.*

The Circuit Court of Appeals concludes:

> "Under the circumstances, there is nothing for us to do but reverse the decision below. If it is thought that the decision of the Supreme Court should be overruled or limited so as not to apply to a case of this character, that is a matter for the Supreme Court and not for us" (App. p. 86).

A fair interpretation of the above language is that the Court did not consider itself free to attempt to distinguish the case before it from the Muscoda decision. Instead, it suggested, even invited, the appellee before it to take the case to this Court and ask it to declare the distinction, if one exists. Petitioner feels that the Circuit Court of Appeals took too narrow a view of its powers and proper

functions. In this connection some weight should be given to the previous denial by this Court of certiorari upon petition of the Union. In effect that action, which was subsequent to the decision by this Court in the Muscoda Case, is a refutation of the conclusion that the Muscoda Case foreclosed the Circuit Court of Appeals from attempting to draw a distinction. Since the Circuit Court of Appeals did not choose to act in the premises, but instead passed the question back to this Court, petitioner looks with assurance to the granting of its application for a hearing.

C. THE QUESTIONS PRESENTED.

1. Did this Court in the Muscoda Case intend to decide the instant case by foreclosing consideration thereof on the merits?

2. With regard to the ruling of the Administrator that there are such differences between the iron mining industry and the bituminous coal mining industry that while the portal to portal basis is properly applicable to the former, face to face may be applied to the latter, did the Circuit Court of Appeals correctly deem the Administrator's ruling to be invalidated by the Muscoda decision in spite of the fact that this Court did not have before it in the Muscoda Case the facts of history and conditions of the bituminous coal mining industry upon which the Administrator's ruling was made?

3. In view of the fact that the Circuit Court of Appeals found that the District Court's findings and decision in the case at bar "*would be convincing were it not for the* (*Muscoda*) *decision* * * *" and would thus have affirmed the case *but for that decision alone*, did the Circuit Court of Appeals correctly hold that it was compelled by that decision to reverse the case despite the fact that this Court in the Muscoda Case did not have before it the facts of the history and conditions of the bituminous coal mining industry and of petitioner's mines, upon which the District Court's decision was based?

4. Was the District Court at liberty to form its own judgment on the facts in this case without giving controlling effect to the findings of the District Court in the Muscoda Case?

5. Did the District Court err in finding essential distinctions between what was shown in the case at bar and what was found in the Muscoda Case as to allowability of the face to face basis in respect to (a) long established custom and practice universally followed in the industry, (b) long succession of uncoerced collective bargaining agreements made both before and after passage of the Act, (c) the respective rulings of the Administrator, (d) the testimony before the committees of Congress specifically relating to the bituminous coal mining industry and the joint committee report, as well as the congressional debates upon the Act, and (e) the conditions and circumstances attending the respective underground travel?

6. Did the District Court err in finding as a fact that underground travel time in petitioner's mines was not "work" time within the requirements of the Act?

7. Did petitioner, by paying its underground workers on the face to face basis in accordance with its collective bargaining agreements, discharge its legal liability to them, or does the Act by its very terms impose an additional liability?

8. Does the Act conclusively impose upon underground travel in petitioner's mines the character and status of "work" so as to withdraw such travel from the field of collective bargaining and compel the parties to treat it as "work" under the Act, irrespectvie of all the facts of history and conditions proved in the case at bar?

9. Has the term "workweek" as used in the Act such a meaning by force of law as to displace the definition of that term traditionally and universally accepted by everybody in the bituminous coal mining industry, and strongly contended for by the Union up to 1943?

D. REASONS FOR GRANTING THE WRIT.

As its reasons for granting the writ herein prayed for, petitioner respectfully assigns the following:

1. The Circuit Court of Appeals has decided in this case an important question of federal law which has not been, but should be, settled by this Court.

2. The Circuit Court of Appeals in this case has given improper effect to a decision of this Court, to-wit, the Muscoda Case.

3. The Circuit Court of Appeals took the decision of this Court in the Muscoda Case, which was based upon the facts, conditions and history of the iron ore mining industry, as declaring the law for the bituminous coal mining industry as well, notwithstanding the distinguishing facts as found by the Administrator and by the District Court, and by the Circuit Court of Appeals itself.

4. Evidence of facts and conditions in the bituminous coal mining industry was excluded from the record in the Muscoda Case, yet the decision in that case was taken by the Circuit Court of Appeals as conclusively controlling the present case without regard to the distinguishing facts as found by the Administrator and by the District Court.

5. The Circuit Court of Appeals construed the decision of this Court in the Muscoda Case as writing into the Act such a definition of the term "workweek" as would necessarily apply to all underground travel in all other mining industries, regardless (a) of the particular industry, (b) of the custom and practice thereof, (c) of a contrary definition of that term established through many years of collective bargaining, (d) of a contrary conclusion of the Administrator, and (e) of the conditions and circumstances attending the travel in petitioner's mines.

6. The Circuit Court of Appeals held that, *solely by reason of the decision of this Court in the Muscoda Case*, underground travel in petitioner's mines was, as a matter of law, "work" within the purview of the Act, notwithstanding that such travel time had been at all times pre-

viously excluded from the workweek by (a) long continued custom and practice universally followed in the industry, (b) common consent of employer and of the employees acting voluntarily through a powerful union and expressed in collective bargaining agreements made both before and after passage of the Act, (c) the N. R. A. Code officially adopted for the bituminous coal mining industry and approved by the President of the United States, (d) the testimony before the committees of Congress and the debates therein upon the Act, (e) the ruling of the Administrator, and (f) the judicial findings of fact sustained by "convincing" reasons supporting the District Court's decision.

7. The Circuit Court of Appeals, considering itself constrained by the decision of this Court in the Muscoda Case, in effect referred this case to this Court for consideration of and decision upon the distinguishing elements of the two cases—"that is a matter for the Supreme Court and not for us" (App. p. 86).

8. The facts in this case, from the standpoint both of employees and employers, are representative in a major industry of the United States and merit examination by this Court before there is a final judgment construing the Act as to one of its provisions peculiarly important to that industry.

9. Factual grounds of controlling importance, found in the Muscoda Case and assigned by this Court in support of its decision, were not only not found to exist in the case at bar, but the very opposite were found.

10. The amount immediately involved in this case is large, and, as concerns petitioner, overwhelming, while the amount collaterally involved as concerns the bituminous coal mining industry as a whole is so large as to threaten insolvency to the entire industry.

11. The issue involved is of vital importance on another score: the coal industry is highly competitive both internally and *quoad* other fuels; labor costs account for about two-thirds the total production cost; travel time is

an inescapable variable in production cost; and the whole system of competitive relations between districts and individual mines has been built up on the "face-to-face" system in which wages were geared directly to work at the usual working place. No competitive conditions have existed in the industry since November 3, 1943, when the "portal-to-portal" basis was adopted. The disturbances and dislocations inevitably to be encountered upon the return of competition are serious in the extreme. For this reason it is of the utmost importance that the employers and employees in the industry should then be free to bargain collectively about so significant a factor and to deal with it in such way as the best interest of the industry may dictate. If the decision of the Circuit Court of Appeals stands, the door is locked against the future adoption by voluntary agreement of any alternative to the portal to portal basis.

E. PRAYER.

The premises considered, your petitioner respectfully prays that the writ of certiorari may issue as hereinbefore set out.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.

JEWELL RIDGE COAL CORPORATION,
a Corporation, *Petitioner*,

v.

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, AN UNINCORPORATED ASSOCIATION, AFFILIATED WITH THE INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL., *Respondents*.

BRIEF FOR PETITION IN SUPPORT OF PETITION FOR CERTIORARI.

PROPOSITION I.

This is Such a Case as Would Ordinarily Impel This Court to Grant Certiorari.

This is a case of great importance to petitioner and to the bituminous coal mining industry in general. Great sums of money are directly and indirectly involved. The manner in which an important federal statute is to be applied to a major national industry is directly in issue. Drastic effects both upon the economy of petitioner and

of the industry in general and upon their future manner of operation hinge on the decision. Neither the facts nor the issue, as to this industry, has ever been before this Court, so that this Court has never spoken thereon. In short, this is just such a case as should reasonably embolden the litigant in ordinary course to anticipate with some confidence that certiorari would be granted.

PROPOSITION II.

The Circuit Court of Appeals Below Erred in Holding That This Court in the Muscoda Case Decided the Same Issue as That Here Presented.

The only apparent argument against certiorari is that this Court in the Muscoda Case decided also the case at bar. The Circuit Court of Appeals below so held and *solely upon that theory* reversed the District Court. If that theory is plainly correct, then certiorari would be pointless.

But there are weighty reasons against that theory, reasons which, as it seems to us, the Circuit Court of Appeals failed to appreciate.

1. This Court in the Muscoda Case did not have before it the facts of the bituminous coal mining industry, but only of the iron mining industry. It specifically excluded and disregarded the testimony which was offered with reference to the bituminous coal mining industry.

The District Court in the instant case pointed out that the Circuit Court of Appeals for the Fifth Circuit in the Muscoda Case "strictly confine their holding to the *particular circumstances of that instant case.*" He quotes the following:

> "We have written in vain if our opinion is to be interpreted as providing a rigid definition of working time or as upholding the portal to portal theory as a matter of law, or as denying the principle *that in close cases it is well to afford the fullest possible scope to agreements among the individuals who are actually*

affected. The evidentiary value of such agreements in relation to working time is for the jury or other fact-finding tribunal. We have expounded no rigid definition of working time. The Act fails to provide one and we should not do what was deemed unwise to do by legislation. The Congress probably failed to define working time for the same reason that it refrained from attempting to define the regular rate of pay, namely: 'because the employment relationships to which the Act would apply were so various and unpredictable' (citing *Walling* v. *Belo Corporation,* 316 U. S. 624, 634) * * *

"Appellants sought by declaratory judgment to obtain a rigid definition of working time favorable to them. They now chide us for laying down such a definition against them. We do not do either; *we merely refused, because not clearly erroneous, to set aside a finding supported by evidence as to what constituted working time of employees in the particular circumstances.* (App. p. 65, 53 F. Supp. 935, 946, court's italics).

To the same effect is the following from the Circuit Court of Appeals in the Muscoda Case:

"Unless the facts are undisputed and only one reasonable inference may fairly be drawn therefrom, what is working time is always a question of fact for the court or jury. In view of the diverse legislation above cited, and the general diversity of opinion on the subject, it cannot successfully be argued in this case that only one fair and reasonable inference may be drawn from the facts and circumstances in evidence." (App. p. 127, 8, 137 F. 2d 176, 184)

Thus it is perfectly plain that the District Court and the Circuit Court of Appeals for the Fifth Circuit in the Muscoda Case confined their consideration and decision to the particular facts *as to the iron mining industry* which were before them—"the declaratory judgment is limited by the facts of the case" (App. p. 119, 137 F. 2d 176, 180).

This Court, in its decision, approved the exclusion of the facts as to the bituminous coal mining industry, saying

that the District Court "*properly directed its attention solely to the evidence concerning petitioner's iron ore mines and disregarded the customs and contracts in the coal mining industry*" (App. p. 140).

The employees in the Muscoda Case, represented by the same attorney who is senior counsel for the Union here, insisted in their brief that the Court should confine its consideration to the iron mining industry, wholly excluding the bituminous coal mining industry from any relation to the case. The District Court below quoted from that brief as follows:

> "We are not trying the case of coal miners. We are not experts on coal mining. We do know that there are two great differences between the coal mining situation and the mining of iron ore in Jefferson County. *In coal mining we find a union which has been strong and powerful and which as a union has been engaged in collective bargaining with the coal operators over a long period of years. In our case we find the efforts of the men to organize their union presents a pitiable picture of helplessness against the domination of the mining companies.* In coal mining the men work seven hours per day. At no point in the voluminous record created by the appellants do we find a single ore mining company offering to pay its men on a seven hour day." (App. p. 70, 53 F. Supp. 935, 948, court's italics.)

The necessary conclusion is that this Court has not had before it any basis for a decision of the present issue in relation to the bituminous coal mining industry, and hence the Circuit Court of Appeals for the Fourth Circuit was in error in holding that this Court in the Muscoda decision decided also the corresponding issue in the case at bar.

With regard to the general language quoted by the Circuit Court of Appeals from this Court's opinion in the Muscoda Case (App. p. 84-5) as sustaining the holding that the Muscoda Case decided the present issue, the importance of confining the effect of judicial language to the

evoking factual setting has long been recognized. Chief Justice Marshall's remarks thereon in *Cohens* v. *Virginia*, 6 Wheat. 265, 399, 5 L. ed. 257, 290, are familiar:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

2. The issue as to what constitutes the work time of specific employees in a specific industry under the requirements of the Act is a question of fact. The decision of this issue with respect to the bituminous coal mining industry can be made only upon consideration of the facts presented by that industry.

Obviously, a consideration of the facts as to the one industry cannot safely be looked to as a basis for deciding the issue as to the other industry. This was fully recognized by the Circuit Court of Appeals in the Muscoda Case, as follows:

> "Whether one is working, resting, idling, playing or preparing to work is as much a matter of fact as whether one is asleep or awake or is laughing or crying . . . The working time of every miner is a definite controlling fact that can and must be finally determined in order to fix the amount of wages due him under the federal statute. *It is a fact that cannot be found in any statute or decision or law book . . . but must be determined by the Court or jury* in any justiciable controversy wherein a real issue arises with respect thereto" (App. p. 124-5, 137 F. 2d 176, 182).

The essential principle was stated by Mr. Justice Jackson in his concurring opinion in the Muscoda Case thus:

> "When Congress in the Fair Labor Standards Act referred to "a week longer than forty hours," it considered, I as e, that *what was a workweek in fact should be a workweek in law.* Therefore, the determination of any particular case does not govern any other, for each establishment and industry stands on its own conditions" (App. p. 144).

The only exception to this proposition which could arise would be when the essential facts of the two industries were identical with respect to underground travel. But that is not the case here.

The District Court below, sitting without a jury, found as a fact that travel time in petitioner's mines is not work time within the requirements of the Act. This is a finding of fact. It was so distinctly held by the Circuit Court of Appeals for the Fifth Circuit in the Muscoda Case—"What constitutes working time is a question of fact depending upon the particular circumstances" (App. p. 107, 135 F. 2d 320, 322); "as much a matter of fact as whether one is asleep or awake" (App. p. 124, 137 F. 2d 176, 182); "what is working time is always a question of fact for the court or jury" (App. p. 127, 137 F. 2d 176, 184).

The District Court's finding, under Rule 52 of the Federal Rules of Civil Procedure, "shall not be set aside unless clearly erroneous . . . " In the note of the Advisory Commission to this Rule it is said:

> "It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony" (U. S. C. A., tit. 28, sec. 723 (c), Rule 52).

Commenting upon the effect of Rule 52, the Circuit Court of Appeals for the Fifth Circuit in the Muscoda Case said:

> "Even where there is no dispute about the facts, if different reasonable inferences may fairly be drawn

from the evidence, an appellate court is forbidden to disturb the findings based on such inferences unless they are clearly erroneous. That this dispute turns upon questions of fact does not withdraw it from judicial cognizance in an action for a declaratory judgment. 'The legal consequences flow from the facts and it is the province of the courts to ascertain and find the facts in order to determine the legal consequences. That is every day practice.' The parties saw fit to submit the issues of fact to the court, without a jury, but this does not render indistinguishable the issues of law and fact. What constituted the workweek of these employees and how many hours they were suffered or permitted to work are questions of fact'" (citing Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 242) (App. p. 120, 137 F. 2d 176, 180-1).

The Circuit Court of Appeals held in the instant case that the District Court's reasons in support of his finding "*would be convincing*, were it not for the (Muscoda) decision . . . ", thus clearly concurring in the District Court's finding. It was said by Mr. Justice Jackson in his concurring opinion in the Muscoda Case App. p. 144):

> "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error."

In view of the weight to which the findings below in the instant case are thus entitled, is it not plain that there is such a showing of distinction between the facts of the two cases as to make it illogical to assume that this Court, in deciding the Muscoda Case, decided the instant case also? If it did not, then the propriety of granting certiorari is distinct.

The District Court below rendered his decision before this Court decided the Muscoda Case, but after the Muscoda decisions of the District Court and the Circuit Court of Appeals. Conceding the correctness of these, he yet found that the facts of the case at bar in the bituminous coal mining industry were so essentially different from the

facts of the Muscoda Case in the iron mining industry as to make the Muscoda decision inapplicable. He said:

> " . . . conceding the correctness of the decision of the majority in the Tennessee v. Muscoda Case, it seems to me that this decision is clearly distinguishable from the instant case and not in point here" (App., p. 68-9, 53 F. Supp. 935, 948).

He noted distinctions under the following heads (App. pp. 69-71, 53 F. Supp. 948-9):

(a) *The Respective Rulings of the Administrator.*—The Administrator ruled in the iron mining industry that the underground travel time must be included in the workweek, whereas in the bituminous coal mining industry his ruling was "precisely the converse" (App. p. 69, 53 F. Supp. 948). The District Court in the Muscoda Case leaned heavily upon the Administrator's ruling in the iron mining industry, saying:

> " . . . these conclusions are the same as those announced in the summary of the so-called modified portal to portal opinion of the Administrator of the Wage and Hour Division . . . " (App. p. 103-4, 40 F. Supp. 4, 10).

The District Court in the instant case correspondingly leaned heavily upon the Administrator's ruling in the bituminous coal mining industry, saying:

> "The fact that the precise question here presented has been investigated and ruled upon by the governmental administrative agency charged with the enforcement of the Act, seems to me to be of paramount importance (App. p. 61, 53 F. Supp. 944).
>
> It seems to me that this particular administrative ruling is entitled to even more than the 'great weight' to which the Supreme Court said such rulings were entitled generally, by reason of the thoroughness with which the Administrator went into the question before making his ruling (App. p. 62, 53 F. Supp. 945).

I do not find anything in this record which satisfies me that this ruling was plainly wrong; in fact, I find nothing which casts doubt upon its correctness. Giving to it the 'great weight' to which the Supreme Court has said it is entitled, it is my conclusion to follow and sustain this ruling" (App. p. 64, 53 F. Supp. 946).

(b) *The Respective Positions of Custom and Usage.*— found that, "beyond any question", the face to face sis was uniformly established by custom and usage in bituminous coal mining industry, whereas this "did not pear to the satisfaction of the Court" in the Muscoda se (App. p. 69, 53 F. Supp. 948).

(c) *The Respective Positions of Collective Bargaining.*— found that the long succession of wage agreements preted by the history of the bituminous coal mining instry providing the face to face basis are "the result of llective bargaining in its complete sense," in which the ployees were represented by a "strong and powerful" ion (App. p. 70, 53 F. Supp. 948), whereas the District urt in the Muscoda Case had found that the wage agreents in the iron mining industry were not "free and unered" agreements on the part of the iron workers but ere dictated almost entirely by the employers" (App. 97, 40 F. Supp. 8).

(d) *The Respective Conditions of Underground Travel.* He found that, whereas the District Court in the Muscoda Case found "that the underground travel was under nditions peculiar to the mining of iron ore which were plete with hazards, highly uncomfortable and requiring ysical exertion . . . ", there were in the underground avel in petitioner's mines "no such painful and burdenne conditions as those described in the iron ore mines" pp. p. 71, 53 F. Supp. 949).

3. The Administrator found essential distinctions between the facts of the two respective industries in relation to underground travel.

As shown hereinbefore, the Administrator issued converse rulings as to payment under the Act for underground travel in these respective industries. His investigation and consideration of the issue with respect to the bituminous coal mining industry covered a period of months and was particularly thorough, as noted in the petition (*supra* p. 6). Of the two rulings he said subsequently in a public statement:

> "The decision we made last July to accept the face-to-face computation of hours worked in bituminous coal mining was reached with considerable difficulty. However, right or wrong, *my bituminous coal opinion was based on a unique situation. Here is a large industry with about half a million employees in which the method of computing hours worked is virtually uniform throughout the industry and has been for many years. Furthermore, it is an industry in which this uniformity in agreement on hours worked has been achieved by national collective bargaining, and arrived at by the employers and the employees year after year in joint meetings which go back for half a century. So far as my knowledge goes the determination of working hours has not been established in this way and with such uniformity in any other industry in the United States.*
>
> "*In the underground metal mining the practice with regard to hours is entirely different*" (R. p. 694).

The essential distinction which the courts below found between the Muscoda Case and the instant case is thus reinforced by the ruling of the Administrator which, as this Court has said, is "entitled to great weight". *United States* v. *American Trucking Associations*, 310 U. S. 534, 549. The opinion of Mr. Justice Reed in *Gray* v. *Powell*, 314 U. S. 402, 411-2, 86 L. ed. 301, is another expression by this Court of the weight to be accorded administrative de-

ermination in applying a statutory term, even when there ras "no dispute as to the evidentiary facts" (p. 412). In he Act now under examination a part of the administrative unction, as pointed out by Mr. Justice Frankfurter in the Iuscoda Case (App. p. 143) is left to the Courts, a circumtance which adds great weight to the trial court's findings vithout detracting from the advisory force of the Administrator's studied conclusion and action within the scope f his responsibility.

4. Conclusion as to Proposition II.

Since (a) all courts, including this Court, in the Muscoda lecisions distinguish and exclude the facts relative to the ituminous coal mining industry, since (b) the District 'ourt in the instant case found essential differences beween the facts of history and of practice relative to underground travel in the respective cases, so as to lead him to onclude that the rule of the Muscoda Case is not applicable to the instant case, since (c) the Administrator lso found such essential differences and arrived at the ame conclusion, since (d) the successful parties in the Iuscoda Case prevailed in their contention that they were not trying the case of the coal miners" (*supra*, p. 18), since e) the issue whether underground travel time is required by he Act to be treated as work time is an issue of fact the deision whereof would differ in a different industry with a different factual picture, it follows that this Court could not n the Muscoda Case be correctly deemed to have decided the ssue here presented as to petitioner's mines in the bituminous coal mining industry. A consideration by this 'ourt of the facts of the instant case ought to be accorded hrough certiorari before it is assumed that this Court has ettled the issue.

PROPOSITION III.

The Equities of This Case Are Such as to Make It Improper for This Court to Permit the Holding of the Circuit Court of Appeals to Stand Without First Giving Full Consideration to the Facts Through a Hearing.

The consequences of the holding of the Circuit Court of Appeals are so harsh as to be shocking. As said by Judge Soper in his dissenting opinion below:

> "This line of reasoning produces such an injustice in the pending case that I am loath to believe that it represents a correct interpretation of the statute or the conclusion which the Supreme Court would reach if the pending case were before it" (App. p. 88).

It is safe to say that this Court would not be inclined to ratify "such an injustice" without prior careful consideration to determine whether the holding is sound. Such consideration cannot of course be had without giving the parties an oportunity to be heard through certiorari.

1. At the time of enactment of the Act, petitioner, and the entire bituminous coal mining industry, had every right to believe, and did believe, that the long established face to face basis of measuring the workweek was, as to this industry, incorporated in the Act by reference.

Mr. Justice Frankfurter, in his concurring opinion in the Muscoda Case, said that the term "workweek" in the Act

> "as applied to workers in this (iron mining) industry and on this (Muscoda) record, has no technical meaning, that is, a meaning so well known to those in this particular industry as to be applied by courts in enforcing the statute when invoked by men in the industry" (App. p. 143).

The opposite situation is presented by the instant case as plainly appears from the following facts:

(a) *Long Familiarity to, and Acceptance by, the Industry.*

The face to face basis of measuring working time was "universally recognized" (App. p. 69) in the bituminous coal industry at the time of enactment, and had been so recognized, as found by the District Court,

> "by the universal custom and usage of the past fifty years and by agreement of the parties in every collective bargaining agreement that was ever made" (App. p. 74, 53 F. Supp. 950).

The Administrator likewise found:

> "Here is a large industry with about half a million employees in which the method of computing hours worked is virtually uniform throughout the industry and has been for many years. Furthermore it is an industry in which this uniformity in agreement on hours worked has been achieved by national collective bargaining, and arrived at by the employers and the employees year after year in joint meetings which go back for half a century. . . . *The determination of working hours has not been established in this way and with such uniformity in any other industry in the United States*" (R. p. 694).

So the face to face basis *was*, in Mr. Justice Frankfurter's phrase, "well known to those in this particular industry."

(b) *Incorporation in NRA Code.*

The face to face basis received the recognition and endorsement of the operators, the union, and the government all three, in the NRA bituminous coal mining Code of 1933, which, as found by the District Court, "was drawn up for the industry by representatives of the union and the operators, and was approved by the President of the United States," providing that the workday "means seven hours work at the usual working places for all classes of labor, exclusive of the lunch period . . . " (App. p. 50, 53 F.

Supp. 939-940). No objection to the face to face basis was voiced in the code hearings by the Union or by any one (R p. 132). John L. Lewis, the president of the Union, testified (R. p. 131), and filed a lengthy brief advocating the Code, in the course of which he said that the

> "work day . . . which generally prevailed . . . in the industry, it should be borne in mind, refers to the time to be spent at the face of the coal vein, and does not include the entire period underground" (R. pp. 656-7).

A provision of the code was the prototype of Section 7 of the Act. The Code provision was:

> " . . . no employee . . . shall be *employed* in excess of seven hours per day and five days per week . . . (R. p. 611).

The term "employed", as there used, did not, as just shown, include travel time. Section 7 of the Act, whose interpretation is here in issue, is:

> "No employer shall . . . employ any of his employees . . . for a workweek longer than, etc."

Until 1943, it was never suggested by any one that the term "employ" as used in the Act had any different meaning from that in the Code, so far as concerned the bituminous coal mining industry. *No reason other than the Muscoda decision has yet been advanced for changing the meaning.*

(e) *Recognition Under Bituminous Coal Act of 1937.*

The Act was under consideration by Congress for several months in the years 1937-8 before enactment. Congress at that time had freshly in mind the economic plight of the bituminous coal industry, having just enacted the Bituminous Coal Act of 1937. That Act, passed for the purpose of stabilizing the economy of the industry (R. p. 203), which had been operating at a deficit for several years

(R. p. 725), authorized the charging of minimum prices, consisting of average production cost (R. p. 203), and set up machinery for arriving at the amount of such prices (R. p. 202). Wages were the chief element of production cost, but in the elaborate and extended hearings which were held pursuant to that Act (R. p. 202) in which the Union and the operators were continuously represented (R. p. 203), it was never once suggested that wages should include payment for travel time (R. p. 204). The face to face basis was consistently recognized.

(d) *The Congressional Proceedings Showed Absence of Any Sentiment for, or Suggestion of, the Change.*

John L. Lewis' testimony at the extended committee hearings, quoted from by the District Court (App. p. 57-8, 53 F. Supp. 943), made it clear that there was no expectation on the Union's part that the Act would affect the wage standards of the bituminous coal mining industry. The exchanges between him and committee members definitely show that he saw nothing in the Act applicable to this industry in which, as he saw it, the standards of wages and hours established through collective bargaining were "much higher than the minimum fixed by Congress" (Committee Hearings pp. 296-7). The failure of the operators to appear at all attests the fact that they were of the same belief. The expressions quoted by the District Court from the President and from the members of both Senate and House in the hearings and debates are to like effect (App. p. 59-60, 53 F. Supp. 943-4). It is a clear inference that no one in the industry or in Congress saw in the Act anything which would make mandatory any changes in the wages, hours or practices as then established through collective bargaining. As said by the District Court:

> "Thus it seems to me clear that it was neither the intent of Congress, nor the desire of the union, in the enactment of the Fair Labor Standards Act of 1938 to interfere in any way with the wage structure of the

bituminous coal industry" (App. p. 60-1, 53 F. Supp. 944).

The bituminous coal mining industry had no reason to suppose that the Act was intended to render illegal the established face to face basis of measuring working time in that industry, and every reason for the contrary belief.

2. After the passage of the Act, both the Union and the operators and the Administrator were in agreement that the Act did not require any change from the face to face basis.

After the effective date of the Act, the respective collective bargaining agreements of 1939 and 1941 were made, including the same face to face basis as always. The Union made no suggestion that the Act required a change. In 1940 the question was raised for the first time whether the Act required underground travel time to be treated as work time (R. p. 135, 140). An investigator of the Wage and Hour Division raised the question and on investigation reported that the face to face basis "was the proper one to be applied in the coal mining industry" (App. p. 51, 53 F. Supp. 940). As found by the District Court, "both the operators and the union officials were definitely opposed to any construction of the . . . Act which would require payment for travel time" (App. p. 51, 53 F. Supp. 940). They united in a written statement to the Administrator calling attention to the fact that the

> "method of measuring working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years, and is the result of collective bargaining in its complete sense . . . Travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898 . . .
>
> " . . . Any ruling requiring such a change in the custom, tradition and contract provision so as to

change the workday from . . . 'work in the mines at the usual working places' to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos . . . Such a ruling moreover would establish such diversity of time actually spent at productive work as between different bituminous coal mines . . . that there would be no basis on which any general wage scale could be predicated, collective bargaining would . . . be rendered impossible . . . , and the very purpose of the Fair Labor Standards Act would be defeated. . . . This would be a most unhappy result to flow from an Act that was passed by Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and the high rates of pay in the bituminous coal mines.

"*The great amount of money involved in the case of extra payment by the operators*, or the great changes that would be required in the rates of pay to the miners, should any change in the present contract be necessary by reason of a new standard for the measurement of time worked, is so serious that a negotiated adjustment would seem to be impossible.

"For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, and the definition of working time, as set forth in the Appalachian Agreement (which embodies the custom and traditions of the bituminous mining industry) as complying both with the provisions of the Fair Labor Standards Act and of the Interpretative Bulletin No. 13, to the effect that 'reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act'." (App. p. 53, 53 F. Supp. 940-1).

Thereafter the Administrator issued a ruling that the face to face basis was within the requirements of the Act in the bituminous coal mining industry; the case of Monroe Coal Mining Company, in which his consideration

of the question occurred, was closed accordingly; and, as found by the District Court:

> "It was thus administratively determined that the provisions of the Fair Labor Standards Act did not require the inclusion of travel time in the workweek . . . " (App. p. 54, 53 F. Supp. 941).

So the industry was again confirmed in the allowability of the face to face basis, the long standing agreement of the operators and the Union thereon being reaffirmed with great emphasis, and the Administrator having concurred. *It would scarcely be contended by anyone that in these circumstances the operators ought to have attempted to change from face to face to portal to portal.* They would have had no reasonable justification for doing so. The uncontradicted evidence shows that a major economic convulsion in the industry would have resulted, as well as a major clash with the Union. And no voice would have been raised in their defense. *Not even could the present action have been then maintained, since no justiciable controversy existed. The operators could not have made the change, even if they had so desired.*

3. The great lapse of time between the effective date of the Act and the reversal of position by the Union has operated to accumulate a vast potential liability under the Act. The passage of time and its effects constitute an important fact in the case.

In 1939 when the collective bargaining agreement of that year was negotiated, the maximum weekly hours under the Act were 44. Since the industry was operating on a 7-hour day and a 5-day week (total 35 hours), travel time could not, in petitioner's mines, even if counted as work time, produce overtime. When, in 1940, the Administrator's ruling was issued, the maximum weekly hours under the Act were 42. This still left a sufficient margin against overtime in petitioner's mines. But on October 24, 1940,

the maximum weekly hours under the Act sank to 40. This did not leave a sufficient margin, because underground travel time consumed more than an hour per day. From that date, if the holding of the Circuit Court of Appeals is sustained, potential liability began to mount by leaps and bounds. The Act provides not only payment of time and one-half for overtime but also an addition of 100% as liquidated damages for failure to pay. The Virginia three-year statute of limitations forecloses claims accruing prior to September 27, 1940 only.

But much more was yet to come. Under date of February 10, 1943 (R. 135, 734), the operators and the Union, on request of the President of the United States, negotiated a supplementary collective bargaining agreement providing for an additional 7-hour day per week thus initiating *a 42-hour week, measured from face to face* (R. pp. 135, 734). Obviously this agreement eliminated the entire previous margin between the 35-hour week under the contract and the 40-hour week under the Act, so that from then on, if travel time was to be counted, liability commenced to accrue for all travel time as overtime at one and one half times the regular rate of pay and with the one hundred percent liability added. What this means is at once apparent when it is considered that there were 444 underground employees in petitioner's No. 1 mine alone, each of whom had 88 minutes of travel time *per day.*

When the 6-day week was agreed upon, the Union still had not reversed its position as to the face to face basis. All parties concerned—the operators, the Union, the Administrator—were still in agreement that the Act did not affect it. So the industry agreed to the 6-day week, to avert an impending national coal shortage, on the understanding that only two hours of overtime per week were to be cared for. The crushing weight of the potential liability now resulting is mentioned in the petition (*supra*, p. 7-8).

When the Union subsequently reversed its position and contended for the portal to portal basis, it did so, *not because its previous conviction as to the proper construction of the Act had changed,* but, as found as a fact by the District Court, the Union

> "only contended for it then as an additional basis for its demand for a general wage increase to all mine workers, both inside and outside the mines . . . Thus the 1943 demand of the Union is actually a demand for a flat wage increase to all mine workers, whether or not they spend any time traveling underground to their usual places of work, and not truly a contention that the . . . Act requires inclusion of the actual travel time as work time for those who have actual travel time underground" (App. p. 54-5, 53 F. Supp. 941-2).

As a prerequisite to engrafting upon the Act at this late day a rigid definition of the questioned term such as would overrule the industry—employers and employees alike—, the Administrator and the trial Court, and work such shocking hardship, a consideration of the very facts and circumstances involved through a hearing of the case by certiorari, would certainly seem to be in order. The language of this Court in *Helvering* v. *Griffiths*, 318 U. S. 371, 402, 87 L. ed. 843, 863-4 is pertinent:

> "We are asked to make a retroactive holding that for some seven years past a multitude of transactions have been taxable although there was no source of law from which the most cautious taxpayer could have learned of the liability. If he consulted the decisions of this Court, he learned that no such tax could be imposed; if he read the Delphic language of the Act in connection with existing decisions, it, too, assured him there was no intent to tax; if he followed the congressional proceedings and debates, his understanding of nontaxability would be confirmed; if he asked the tax collector himself, he was bound by the Regulations of the Treasury to advise that no such liability existed. It would be a pity if taxpayers could not rely on this concurrent assurance from all three branches of the

Government. But we are asked to brush all this aside and simply to decree that these transactions are taxable anyway."

4. Comparable equities did not arise in the Muscoda case.

The facts in the Muscoda Case are so wholly different, that no argument can be made that this Court disregarded similar equities in that case.

(a) *The respective amounts of travel time involved.*—In the iron mining industry little underground travel was involved, open-pit operations being the rule (Muscoda Case Rec. Vol. VI., 44, 47-49).

(b) *The respective rulings of the Administrator.*—The Administrator issued a ruling under date of March 15, 1941, applicable to the iron mining industry that

> "The work day * * * starts when the miner reports for duty as required at or near the collar of the mine and ends when he reaches the collar at the end of the shift" (i. e. portal to portal) (App. p. 104, 40 F. Supp. 10).

In the complaints filed in the Muscoda Case it was alleged and undenied that upon the issuance of this ruling and prior to the institution of the actions, 'because of the perils of litigation, the irreparable injury to which the operators would be subjected if the opinion of the Administrator was judicially held to be correct, and the resulting great loss in money and in the output of iron ore, the operators in the iron mining industry, under protest, had adjusted their operations so as to comply, pending the judicial determination of the question, with the ruling of the Administrator.' So no unwieldy accumulation of potential liability was built up in that industry, because of the tenor of the Administrator's ruling *and the consequent early date of the change to the portal to portal basis.*

(c) *No reversal of union position in the iron mining industry.*—Both the Administrator and the unions took the

position from the outset that face to face was illegal in the iron mining industry under the Act, and never took a position that it was legal.

(d) *The respective importance of the face to face basis in the two industries.*—The competitive positions of the units in the iron ore industry were never anchored to the face to face basis through area freight rates and uniform wage schedules, as had long been the case in the bituminous coal mining industry.

(e) *No NRA Code affirmance of face to face in the iron mining industry.*—The iron mining industry had not had an NRA code based upon face to face, as had been the case in the bituminous coal mining industry.

(f) *No unbroken course of custom and usage in the iron mining industry.*—The iron mining industry had not had a long and unbroken course of custom and usage and of uncoerced collective bargaining buttressing the face to face basis, as had been true in the bituminous coal mining industry (Opinion of District Court, Muscoda Case, App. p. 97, 40 F. Supp. 7-8).

(g) *No 6-day week in the iron mining industry.*—The iron mining industry had no collective bargaining contract for an enlarged workweek based on face to face, in response to governmental request for greater production to meet national emergency demands.

(h) *No "painful and burdensome" conditions of travel in bituminous coal mining industry.*—Owing to the effects of a half century of collective bargaining with a "strong and powerful union", underground travel in petitioner's mines "is neither painful nor unduly uncomfortable and is less hazardous than other phases of mining operations" (Opinion of District Court, App. p. 49, 53 F. Supp. 939). It presents "no such painful and burdensome conditions as those described in the iron ore mines" (Opinion of District Court, App. p. 71, 53 F. Supp. 949). Consequently

petitioner had no such reason to regard underground travel time as work time, as was the case in the iron ore industry.

5. The Circuit Court of Appeals was mistaken in supposing that petitioner and the bituminous coal mining industry in general have necessarily been released from the vast potential liability which would ensue if the holding of the Circuit Court of Appeals were sustained.

It is said by the Circuit Court of Appeals below that

> "The disturbing effect of the decision here will not be so great as it otherwise would in view of the fact that by agreement between the miners and operators, the portal to portal system of computing the workweek has now been adopted in the industry. An amended answer filed in the cause waives the right to additional wages due under the Act prior to April 1, 1943 * * *; and the amount claimed as additional wages between April 1 and June 20, 1943, is only the amount voluntarily awarded the workers in other mines as a result of the settlement arrived at when the portal to portal basis was adopted" (App. p. 86).

The Circuit Court of Appeals was here laboring under a serious misapprehension. This is made clear in the dissenting opinion of Judge Soper:

> "It is suggested in mitigation of the harsh effect of a decision adverse to the Mining Company that the amount claimed by the miners in this case has been limited, by amendment of the counterclaim, to the period beginning April 1, 1943 and ending June 20, 1943. Indeed it is assumed in the briefs that each miner's claim is limited to the sum of $40 and that the total sum involved is approximately $40,000. These statements cannot be verified in the record. The amendment to the counterclaim is not limited to the period ending June 20, 1943 but contains merely the assertion that the miners will not further assert their claims to travel time prior to March 31, 1943. The end of the period for which the claim is made is not stated; nor is the amount of the claim defined. The assumed limitation of the period to June 20, 1943, and to the sum of

$40 per miner seems to be based on the terms of agreements entered into between the union and other mining corporations; but so far as the record discloses, the Jewell Ridge Coal Corporation has never entered into a new agreement or paid for travel time. If a claim is asserted for the full amount due under the Act, as now interpreted by the miners, a very much larger sum than $40,000 will be involved in this controversy.

Moreover, the decision may be of grave importance in its application to other mine owners who have not dealt with the union or have not signed wage agreements. If the new interpretation of work time is applied to them over the period that has elapsed since the passage of the Act, subject only to local statutes of limitations, and double payment is exacted under the penal sections of the Act, it may be that the mine owners will be subject to losses of huge amounts. Indeed the decision might prove even more sweeping in its effect for it might invalidate the compromise provisions respecting pay for travel time and liquidated damages that form part of contracts between the mine owners and the union in a large part of the industry. If portal to portal pay is required under the Act as a matter of law, such settlements are not binding if the amount paid is less than the actual wages due under the Act; and the mine owners would become liable not only to make up the deficiency but to pay an equal amount in addition as liquidated damages. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572. See also, *Guess* v. *Montague*, 4 Cir., 140 F. 2d 500; *Fleming* v. *Warshawsky & Co.*, 7 Cir., 123 F. 2d 622; *Johnson* v. *Dierks Lumber & Coal Co.*, 8 Cir., 130 F. 2d 115; *Rigopoulon* v. *Kervan*, 2 Cir., 140 F. 2d 506; *Birbalas* v. *Cuneo Printing Industries, Inc.*, 7 Cir., 140 F. 2d 826.

These considerations give force to the conclusion that Congress could not have intended to compel mine owners to pay large increases in wages over and above those specified in prevailing agreements, and also to inflict upon the mine owners additional sums in the nature of a penalty by giving to the term "workweek" as used in the statute, a significance contrary to that which by voluntary agreement and by long continued custom had prevailed in the industry."

As stated in the petition (*supra,* p. 7-8), the potential liability of petitioner, under the contingencies mentioned by Judge Soper, merely for the period from April 1, 1943, to November 3, 1943, is estimated at approximately $300,000.00, while if the union's voluntary disclaimer applicable to the period prior to April 1, 1943, is not binding upon petitioner's individual employees, the total potential liability, under those contingencies, would approximate a million dollars.

With regard to the "settlement" supposed by the Circuit Court of Appeals to have been effected with certain other units in the industry by the Union, the decided cases cited by Judge Soper hold that such settlements will not be recognized by the courts. As to other units in the industry which have made no contracts or "settlements" with the Union, the majority opinion of the Circuit Court of Appeals does not undertake to give them any hope at all for escape from ruin.

As for the "adoption" of portal to portal by "agreement between the miners and the operators" mentioned in the majority opinion of the Circuit Court of Appeals (App. p. 86), this occurred subsequent to the trial of this case and hence is *dehors* the record. For the most part the presently effective agreement follows the second Illinois Supplementary Agreement of September 23, 1943 (R. pp. 779-785) and contains the following provision:

> "16. This Supplemental Agreement is an integrated instrument and its respective divisions are interdependent, and shall be in effect only after the approval hereof by the appropriate governmental agencies and *after the granting by the Office of Price Administration of advances in maximum prices sufficient to cover the increased costs occasioned hereby.* (R. p. 785)

It is true that there has been achieved *through collective bargaining* a shift from the face to face basis to portal to portal with an assumed travel time factor. That under wartime absence of competition this has proved workable

is no assurance that it will continue so when competitive conditions recur. Rather the fact that the shift was made not by force of law but by collective bargaining, and in response to the abnormal circumstances of war, argues in favor of leaving treatment of the questioned term to the further processes of collective bargaining without the restraint of a rigid definition imposed by law.

The disturbances to the industry consequent upon portal to portal, which the majority opinion belittles, are merely held in abeyance pending the war. Upon the return of the industry to a competitive basis, the ills testified to by representatives of the operators and the union alike, as quoted hereinbefore (*supra*, p. 30-1), will inevitably appear. As said by the District Court:

> "*The bituminous coal industry is sui generis.* Its problems have been before Congress for many years. It is one of the few industries, for the regulation of which special Acts of Congress have been passed such as the two Guffey Acts. It is a highly competitive industry. Not only is there competition between the individual coal operators: there is competition between the northern operators and the southern operators, and always there is the sharpest kind of competition between the producers of bituminous coal and the producers of other fuels such as oil and gas. These conditions and many others are important factors which must be regarded in making up a wage structure for the bituminous coal industry" (App. p. 56, 53 F. Supp. 942).

CONCLUSION.

In view of the strong considerations supporting the prayer of the petition and hereinbefore pointed out, we respectfully submit that certiorari ought to be granted.

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APPENDIX

JEWELL RIDGE COAL CORPORATION

v.

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, ET AL.

Civil Action No. 73.

District Court, D. Virginia, at Abingdon.

Jan. 25, 1944.

Action for a declaratory judgment by Jewell Ridge Coal Corporation against Local No. 6167, United Mine Workers of America, and others, to determine whether the time spent by plaintiff's employees in traveling from portals of mines to their usual working places and return constitutes working time required to be included in the work week under the Fair Labor Standards Act, wherein petition of the Southern Coal Producers Association for intervention was denied.

Order directed to be entered declaring rights of parties in accordance with opinion and dismissing the action.

See also 3 F. R. D. 251.

* * * * * * * * * * *

BARKSDALE, District Judge.

Statement of the Case.

This is a declaratory judgment action instituted by Jewell Ridge Coal Corporation, the owner and operator of two bituminous coal mines in this District, against two locals of the United Mine Workers of America and certain officials and committee members thereof, District No. 28, United Mine Workers of America, and its officers, and International Union, United Mine Workers of America and its president. The two defendant locals of the Union comprise all of the underground mine workers employed by plaintiff, said two

locals being within the jurisdiction of said District 28, said District 28 in turn being a component of the International Union, United Mine Workers of America. The complaint alleges, the joint answer of all defendants admits, and the evidence proves, the existence of an actual justiciable controversy between plaintif and defendants as to the construction of Section 7 of the Fair Labor Standards Act, 29 U. S. C. A. § 207. By pretrial order, it was stipulated that the issues to be now tried in this action are as follows:

"a. What constitutes the working time which makes up the work week of plaintiff's underground employees within the meaning of Section 7 of the Fair Labor Standards Act of 1938, and what amounts, if any, are due and unpaid to such employees under said Section, the determination of such amounts, if any, to be later referred to a special master:

"(1) In reference to 'a' above, the plaintiff contends that such work week does not include that portion of the time spent by its underground employees in being transported or walking to and from their usual working places.

"(2) In reference to 'a' above, the defendants contend that such work week includes all the time from the time such employees are required to report and do report for work at the portal of the mine until they return to the portal at the end of the shift, less the regular lunch period when they are relieved of all duties."

Neither side having demanded a jury, evidence adduced by both sides has been fully heard in open court by the court without a jury, oral argument has been heard, and briefs have been filed on behalf of both sides, and a brief has also been filed by Southern Coal Producers Association [of which plaintiff is a member], whose petition for intervention was denied, but which was permitted to participate as an *amicus curiae*.

This action having been tried upon the facts by the court without a jury, the court doth hereby find the facts specially and state separately its conclusions of law thereon, and directs the entry of the appropriate judgment, as follows, in conformity with Rule 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c:

Findings of Fact.

Plaintiff, Jewell Ridge Coal Corporation, owns and operates two coal mines within this District, the older one being known as the "Jewell Ridge Mine" and the other being known as the "Jewell Valley Mine". The Jewell Ridge Mine was opened in 1910, and the Jewell Valley Mine in 1936. Both mines having been in operation for a number of years, the coal now being mined is at a considerable distance from the driftmouth or portal of the mines. Jewell Ridge being the older mine, the distances there are naturally greater, and vary from approximately 4,250 feet to 25,460 feet; at Jewell Valley, the distances vary from approximately 4,600 feet to 14,450 feet. Approximately 500 men are employed at each mine. Although there are slight differences, the methods of operating the two mines are substantially the same.

The coal which is mined at these two mines exists in seams, the thickness of which varies in the two mines from 32 to 54 inches. The main tunnels into the mines, from which coal has been extracted, are known as "haulage ways". From these haulage ways, laterals have been driven which are called "cross entries". These cross entries give access to, and form the boundaries of, "rooms", from which all the coal is taken except the pillars that are left to support the roof. Electric railways are operated for the removal of the coal when mined, and then men are also transported to and from their places of work on these railways. The company has numerous employees for the operation and maintenance of these railways and the electric power systems and the maintenance of safety within the mines,

such as motormen and brakemen, trackmen, bratticemen, wiremen, and a bondman. These employees are all called "company men" and are paid at hourly rates. The employees who actually extract the coal from the seams, are known as "machinemen" and "coal loaders". The method is about as follows: Between shifts, the machinemen place their cutting machines at the faces of the seams. Each machineman then makes a cut or kerf, approximately six inches in height, at the bottom of the seam of coal and parallel to the floor, which cut extends across the width of the room or working place and back into the seam to the depth of six or eight feet. The fragments from this cutting, called "bug dust", are first removed by the "coal loader" when he begins his work, by means of a long-handled shovel. The loader then bores holes at the top of the seam of coal to the same depth as the undercut. He then places explosives in these holes and fires them. These explosions dislodge the entire section of coal which has been undercut, pushing it down and outward. The loader, with his pick and shovel, then proceeds to load the coal thus shot down, into empty coal cars placed adjacent to his work place by operators of gathering motors. The coal is then hauled out to the tipple, processed, graded, and ultimately loaded into railway cars for shipment. All coal loaders, and ordinarily, the machinemen, are paid upon a piece-work basis, that is, at an agreed rate for each ton of coal. The hours of labor of these piece-work employees are, however, important, because they are paid a time-and-a-half rate, or more accurately, a rate-and-a-half rate, for coal extracted by them after the expiration of seven hours of labor.

All plaintiff's employees are required to be at their places of work, for the morning shift, at 8 o'clock, A. M. The men come from their homes to the mines in various ways. Some walk, some come in their own cars at their own expense. More than 400 come in trucks and buses operated for that purpose by the plaintiff company and certain individuals, the expense of such transportation being borne by the com-

pany. The employees arrive at the mines at various times, but each in time to board the "man-trip" which is to take him to, or near, his respective place of work. "Man-trips" are trips made by trains of mine cars drawn by electric locomotives for the purpose of transporting the underground workers to or near their respective places of work. Employees leave the trains at the "man-trip stations" which are nearest to their respective places of work, and walk the rest of the way.

Upon arrival at the mines, each underground worker first obtains his lamp from the company's lamp house near the portal, which is an electric light that has been charged while the employee is off duty. Each underground worker carries with him such drinking water as he needs for the day, as well as his lunch.

After securing their lamps, various men do various things before taking the man-trip. Coal loaders, the most numerous class, do nothing, unless they have brought tools out for repair. Some four or five times a month, they bring tools out for repair, and on such occasions they go by the blacksmith shop and obtain their repaired tools. The bondman, wiremen, brattiemen, trackmen, and such machinemen as ride man-trips, get such tools as they may have brought out of the mine from the tool house, and such supplies as they may need for the day, from the supply house, and load them into the tool cars of their man-trips. However, if these men so desire, they have the option to give their orders for supplies to the section foreman, and such supplies will be delivered on their section overnight by the supply crew. Some machinemen use motors, and those who do, get two gallons of oil from the oil house, approximately 50 pounds of machine bits from the blacksmith shop, and such other equipment as may be necessary, and load such supplies and equipment onto their motors. They get their motors out of the yard, switch them to the sand house, where they fill their four sand boxes and oil the motor. They then run their motors to their assigned places of oper-

ation in the mine. Motormen and brakemen go through substantially the same process of getting out their motors and oiling and sanding them, as the machinemen do, before proceeding in the motors to their places of work. These preliminary activities require variously from three to ten minutes.

As previously stated, "man-trips" are for the transportation of underground workers to or near their places of work. They are operated by, and at the expense of, the company. At the Jewell Valley Mine, all underground workers use the man-trips to travel from the main portal to their places of work at Jewell Ridge, approximately. 72 men enter the mine at places other than the main portal and catch the man-trips at some man-trip station inside the mine, or walk all the way to their places of work. Their lamps are brought to them by their section foremen. Transportation for employees by man-trips is necessary for the successful operation of the mines. They constitute a benefit to both employer and employees. They benefit the company in promoting safety, orderliness and increased productiveness; they benefit the employees by saving their time and energy, and thus increase their productiveness.

Each man-trip is composed of a train of empty mine cars such as are used to haul coal, drawn by an electric motor or locomotive. The first car after the locomotive, is the tool car, in which is hauled all mining tools and supplies of the men who ride that man-trip. No one is permitted to ride in the tool car. Ordinarily, seven men ride in each of the other cars of the train, never more than eight. Each car is about 12 feet long and seven feet wide inside. The bottom, or lowest part of the car, is 2 feet, 6 inches wide. Alongside of that area, and rising above it, is a sort of bench approximately 2 feet, 3¾ inches, wide, and above that, rise the outside walls of the car to the height of 11 inches. Men riding in these cars ordinarily sit on the bench, or, where the top is low, in the bottom of the car. The man-trips are scheduled, those going the greatest distances leaving first, and an interval between trains of at

least 500 feet is maintained. The movement of the trains is governed by dispatchers, and the speed of the trains is kept within a maximum of six miles per hour as nearly as practicable. Each man-trip is under the supervision of a foreman, who sees to it that safety rules and regulations are complied with. During the course of the man-trips, foremen occasionally give instructions to employees as to the work they are to perform at their working stations. Such instances are rare, as instructions are ordinarily and customarily given at the working place. No work or labor is required of employees while riding on man-trips, and supervision is limited to the enforcement of safety rules and regulations. Those riding on man-trips sit upright where the roof is high enough, but find it necessary to bend over where the roof is low. Riding on man-trips, while definitely not luxurious, is neither painful nor unduly uncomfortable, and is less hazardous than other phases of mining operations. All coal mining operations are relatively hazardous. During 1941, the last year for which statistics are available, there were reported to the United States Bureau of Mines, 47,742 accidents, of which, 1,075 were fatalities. Assuming that 450,000 men were then engaged in coal mining, the reported accidents represent an accident of some character to more than one out of every ten coal miners during that year. In view of these statistics, and the number of men traveling daily on man-trips in plaintiff's mines, the injuries shown by the evidence to have been received by employees in plaintiff's mines on man-trips are surprisingly few in number and extent.

If Section 7(a) of the Fair Labor Standards Act requires inclusion of travel time as work time, many, if not all, of plaintiff's underground employees have not received all the compensation required by the Act.

Both plaintiff's mines, from the very beginning, have always been operated on the "face to face" basis. The "face to face" basis means that hours of labor are computed on the basis of work at the usual working places, and therefore excludes any consideration of travel time spent in reach-

ing the usual working places and returning therefrom. The "face to face" basis is traditional in the bituminous coal mining industry in this country, and has universally been the basis for the determination of hours of labor therein for approximately the past fifty years. In England and Continental Europe, the basis has been "bank to bank", or portal to portal, or some modification thereof.

Plaintiff's employees were first organized and became members of the United Mine Workers of America in 1933 following promulgation of the NIRA Code of Fair Competition for the Bituminous Coal Mining Industry. This NIRA Code of Fair Competition was drawn up for the industry by representatives of the Union and the Operators, and was approved by the President of the United States. It provided for the "face to face" wage basis by the use of the following language:

"* * * and this means seven hours work at the usual working places for all classes of labor exclusive of the lunch period. * * *"

Basic wage agreements were entered into by the Union and the Operators, as of April 1, 1934 (continued in effect by successive extension agreements from March 31, 1935, until October 1935), as of October 1, 1935, as of April 2, 1937, and as of May 12, 1939. All these agreements were the result of collective bargaining. The last mentioned agreement, as of May 12, 1939, to extend for a period of two years, was made when the Fair Labor Standards Act was nearly a year old and had been in effect for more than six months. Nevertheless, it, as well as the previous wage agreements, provided for the "face to face" wage basis, necessarily excluding all travel time from the work week. Also the last basic wage agreement reached by collective bargaining, dated April 1, 1941, to extend for a period of two years, provided for the "face to face" basis, in the familiar language of the preceding agreements.

Early in 1940 an investigation by the Office of Wage and Hour Administration of the operation of the Monroe Coal

Mining Company in Pennsylvania was begun, to determine whether or not that company's operating practices complied with the Fair Labor Standards Act. In the course of that investigation, the investigator raised the question of whether or not underground travel time of employees must be included in the work week under the terms of the Act. After an extended investigation, the investigator made an exhaustive report in which he discussed at length the matter of travel time and stated as his opinion that the "face to face" basis, excluding travel time, was the proper one to be applied in the coal mining industry, but he indicated that if the rule as applied in the Cornucopia Gold Mining Company case were applied, the Monroe Company would owe its underground workers approximately $70,000.

This situation was brought to the attention of Mr. Charles O'Neill, President of the Central Pennsylvania Coal Producers Association and a Director of the Monroe Company. He in turn brought it to the attention of other coal operators and of Mr. John L. Lewis, President of the International Union, United Mine Workers of America. Thereafter, representatives of the coal operators and the United Mine Workers conferred from time to time with representatives of the Office of Wage and Hour Administration. Both the Operators and the Union officials were definitely opposed to any construction of the Fair Labor Standards Act which would require payment for travel time. On July 9, 1940, the members of the Appalachian Joint Conference Negotiating Committee for the Operators, and Mr. Earl E. Houck, Director of the Legal Department, for the United Mine Workers of America, jointly composed and sent a letter to Col. Philip B. Fleming, Administrator of the Wage and Hour Division, fully setting out their views on the subject. Amongst other things in their letter, they said:

"This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years, and is the result of collective bargaining in its complete sense. * * *

"The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual working place. Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898.

"It is urged that any ruling requiring such a change in the custom, tradition and contract provision so as to change the work day from 'seven hours' work in the mines at the usual working places' to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated. In such an event, it would make necessary the reassembling of the Appalachian Joint Wage Conference and it would be faced with an issue that would be almost impossible of solution by agreement, resulting in an industrial conflict that could paralyze the nation. This would be a most unhappy result to flow from an act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and the high rates of pay in the bituminous coal mines. The great amount of money involved in the case of extra payment by the operators or the great changes that would

be required in the rates of pay to the miners, should any change in the present contract be necessary by reason of a new standard for the measurement of time worked, is so serious that a negotiated adjustment would seem to be impossible.

"For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, and the definition of working time, as set forth in the Appalachian Agreement (which embodies the custom and traditions of the bituminous mining industry), as complying both with the provisions of the Fair Labor Standards Act and of the Interpretive Bulletin No. 13, to the effect that 'reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act.'

"We therefore respectfully request that your Division issue a supplement to Interpretive Bulletin No. 13, stating that the standard of wages and hours of work and definition of working time, set forth in the Appalachian Agreement, entered into on May 12, 1940, between twenty-three district associations of bituminous coal operators comprising the Appalachian coal producing area and the International Union, United Mine Workers of America, and the several district agreements based thereon, conform to and satisfy the requirements of the Wage & Hour Act."

By letter of July 18, 1940, from Col. Fleming, Administrator, to Mr. Houck, Director of the Legal Department of the United Mine Workers of America, Col. Fleming, referring to Mr. Houck's letter of July 9, 1940, just referred to, said in part:

"In view of the circumstances which you describe in your letter, and in view of the special facts which were developed at conferences with representatives of the industry, it is our opinion that the practice of computing working time on a 'face to face' basis in the bituminous coal industry would not be unreasonable."

Promptly thereafter, Col. Fleming issued a public statement on July 27, 1940, in which he said in part:

"In view of the circumstances described by the industry in submitting its inquiry, Colonel Fleming announced that the practice of computing working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable. Colonel Fleming explained the term 'face to face' to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the place of work and the time spent in returning from the working place to the portal in the evening."

The Monroe Coal Mining Company case was then closed, and it was thus administratively determined that the provisions of the Fair Labor Standards Act did not require the inclusion of travel time in the work week of the underground employees in the bituminous coal mining industry.

The United Mine Workers Union has never, in any way contended that travel time was work time under the Fair Labor Standards Act until the Wage Conference of March, 1943, and only contended for it then as an additional basis for its demand for a general wage increase to all mine workers, both inside and outside the mines. The 1943 demand of the Union, under the heading "Hours of Labor", for travel time, is as follows:

"To conform with the basic and legal requirement for the industry, the maximum hours and working time provisions be amended to establish portal to portal for starting and quitting time for all underground workers."

The succeeding demand, under the heading "Wage Rate Increases", calls for a two dollar a day flat wage increase "for all classifications of inside and outside day men", and equivalent increases for piece workers, and provides:

"The increased rates include compensation to meet the portal to portal starting and quitting time."

Thus, the 1943 demand of the Union is actually a demand for a flat wage increase to all mine workers, whether or not they spend any time traveling underground to their usual places of work, and not truly a contention that the Fair Labor Standards Act requires inclusion of the actual travel time as work time for those who have actual travel time underground.

Conclusions of Law.

The crucial question which I now have for determination, as set out in the pretrial order, briefly stated, is whether or not the time spent by plaintiff's underground employees in being transported or walking from the portals of the mines to and from their usual working places constitutes working time which must be included in the work week of plaintiff's underground employees by reason of the Fair Labor Standards Act of 1938.

The pertinent portions of the Act are as follows:

"Section 7. (a) No employer shall * * * employ any of his employees who is engaged in commerce or in the production of goods for commerce— * * *

"(3) for a work week longer than forty hours * * *, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U. S. C. A. § 207(a) (3).

"Section 3. (g) 'Employ' includes to suffer or permit to work." 29 U. S. C. A. § 203(g).

It will be readily conceded by all, that travel by employees from the portal to their places of work, and return, is not for the pleasure, relaxation or amusement of the employees, but it is to be carefully noted that the question is not whether it would be fair for the employer to pay employees for this travel time, or whether I think the employees should be paid for travel time; the real question is whether the language of the Act *requires* such payment. The language of the Act certainly does not in definite terms cover the question here

presented. So it would seem advisable to look into the legislative history of the Act.

Legislative History of the Act.

I can neither find, nor has anything been pointed out to me, in the legislative history of the Fair Labor Standards Act of 1938, which indicates that it was the intent of Congress to make so radical a change in the wage structure in the bituminous coal industry as to require payment for underground travel time. It is idle to say that, because employees in other industries are compensated under the Act for travel time under various and diverse conditions and circumstances, underground employees in the bituminous coal industry under and by virtue of the Act, must be paid for travel time. Circumstances alter cases. Under some circumstances, travel time is work time: under other circumstances it is not. The bituminous coal industry is *sui generis*. Its problems have been before Congress for many years. It is one of the few industries, for the regulation of which special Acts of Congress have been passed such as the two Guffey Acts. It is a highly competitive industry. Not only is there competition between the individual coal operators: there is competition between the northern operators and the southern operators, and always there is the sharpest kind of competition between the producers of bituminous coal and the producers of other fuels such as oil and gas. These conditions and many others are important factors which must be regarded in making up a wage structure for the bituminous coal industry. And in this industry, the wage structure is of peculiar importance because the cost of labor makes up approximately two-thirds of the cost of the production of coal. Of course, the Fair Labor Standards Act applies to the bituminous coal industry, as it applies to all interstate industry, but in situations not precisely covered by the language of the Act, its legislative history, as well as all the facts and circumstances, should be examined.

The first general regulation of wage and hour standards for private employment was embodied in the National Industrial Recovery Act, 48 Stat. 195. In the Bituminous Coal Code, adopted under the NIRA in 1933, travel time was definitely excluded, and the "face to face" basis was adopted by the following language:

"No employee shall be required or permitted to work more than eight hours in any one day *at the usual working places* * * *." (Italics mine).

Similarly, in the 1934 amendment, it was provided that:

"Seven hours of labor shall constitute a day's work, and this means seven hours' work *at the usual working places for all classes of labor*, exclusive of the lunch period, whether they be paid on the day or the tonnage or other piece-work basis; * * *" (Italics mine).

This Code remained in effect until 1935, when the National Industrial Recovery Act was held unconstitutional.

In 1937, fair labor standards bills were introduced in both Houses of Congress, and extensive committee hearings were held on these bills. Mr. John L. Lewis, President of the United Mine Workers of America, testified at length, and at no time indicated that travel time should be included as work time. On the contrary, he indicated that he did not expect the bill to affect the coal industry. The following excerpts are from his testimony:

"Senator LaFollette. * * * As I understand it, the objective of this bill as outlined in Section 23, one of them is to prevent the board from going in and upsetting collective bargaining agreements or entering the field where collective bargaining is actually functioning in a bona-fide manner, and thereby producing the result of the action of the employer and employee represented by genuine and effective labor organization." (Page 280.)

"Mr. Lewis. * * * For instance, frankly I would not want this bill to convey power to a board to order an investigation into all of the wage agreements in the mining industry right now, or to give the board power to decide that the

collective-bargaining agreements in the mining industry were not sound, not proper, were confiscatory, or not in harmony with the facts of the industry and order a modification thereof. I think the power of the board should be limited to cases which run below the level of the standards fixed by Congress. I see endless confusion in the adoption of section 5 now. I see a drift toward the complete fixation of wages in all industry by governmental action." (Page 281.)

"Senator Holt. Would you favor allowing the board to investigate collective bargaining agreements where the collective bargaining agreement was beyond the wage level?

"Mr. Lewis. No; I see no point in it.

"Senator Holt. If they have a right to investigate collective bargaining agreements below the wage level why should not they have the right to investigate collective bargaining agreements above the wage level?

"Mr. Lewis. Merely because their right of investigation of agreements that were substandard would be for the purpose of ascertaining whether that was so and of modifying them to meet the congressional standards". (Page 297.)

Excerpts from "Joint Hearings Before the Committee on Education and Labor, United States Senate, and the Committee on Labor, House of Representatives, June 2-22, 1937."

In its report on an amended bill in the nature of a substitute, the Senate Committee on July 6, 1937, said:

"The right of individual or collective employees to bargain with their employers concerning wages and hours is recognized and encouraged by this bill. It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-work hour industrial workers who are the helpless victims of their own bargaining weakness that this bill seeks to assist to obtain a minimum wage." (Senate Report No. 884, 75th Cong.)

During the debates on the bill, numerous statements were made indicating that it was not the intent of Congress to interfere with the process of collective bargaining. The following are of interest:

"Mr. Walsh. Next, does the bill affect collective bargaining agreements already made or hereafter to be made between employer and employee?

"Mr. Black. It does not." (Senate, July 27, 1937. Congressional Record, Vol. 81, p. 7650.)

"Mrs. Norton. * * * It is not the intention of this amendment, or of the bill, to start fixing wages in all industries but only in those in which oppressive wages are being paid to a substantial portion of workers. * * * " (House, December 13, 1937, Congressional Record, Vol. 82, p. 1391.)

"Mr. Randolph. * * * It (the bill) is not concerned with that fortunate majority of the laboring classes whose collective bargaining power is sufficiently potent to insure the preservation of their industrial rights.

"But is is concerned with those millions in industry who are unprotected and unorganized. * * * " (House, December 13, 1937, Congressional Record, Vol. 82, p. 1395; Parenthesis supplied.)

"Mr. Curley. * * * There is no conflict of jurisdiction under the provisions of this fair standards of labor bill, and the existing labor organizations of this country. The bill concerns only of relieving the paralysis which, at present, shackles misery and poverty to millions of heads of families, who are underpaid and causing a colossal financial loss in purchasing power because of existing deplorable conditions." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7285.)

"Mr. Boileau. * * * What is more, we are preserving for organized labor its right to bargain collectively and it will bargain for a higher wage than that." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7290.)

"Mr. Allen. * * * This bill has a threefold purpose as I see it. First, it eliminates sweat shops— * * * The bill

does not affect organized labor, but those 5,000,000 American working men and women who have not yet been benefited by organized labor." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7291.)

"Mr. Fitzgerald. * * * I would have you observe that this proposed legislation will not improve the wages and hours of the majority of workers, nor does it attempt to. For I am greatly pleased to say that the majority of workers do not need this legislation because they are receiving a living wage and are not forced to work unreasonable hours." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7310.)

Although the above statements were made at various times while the measure was being amended and revised, and therefore not with respect to the Bill in its final form, they show a continuing intention not to interfere with the processes of collective bargaining.

No such statute was enacted in 1937, and in regard to wage and hour legislation, in his message delivered on January 3, 1938, the President said:

"We are seeking, of course, only legislation to end starvation wages and intolerable hours; more desirable wages are and should continue to be the product of collective bargaining." (Congressional Record, Vol. 83, p. 9.)

Shortly before the passage of the Fair Labor Standards Act of 1938, Congressman Connery, one of its patrons, said of it:

"The thing to remember about this bill is that it is not designed to be a cure-all for industrial wages. It is merely aimed at wiping out sweatship conditions and child-labor. Those are the two salient features and should be kept in mind." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7322.)

Thus, it seems to me clear that it was neither the intent of Congress nor the desire of the Union, in the enactment of the Fair Labor Standards Act of 1938, to interfere in any way with the wage structure of the bituminous coal

industry. A statement made by Major Percy Tetlow, an official of the International Union, United Mine Workers of America, who testified in this case, seems to bear out this conclusion. He said:

"No, the miners' organization has always taken the position that the question of wages, hours and conditions of employment should be governed and controlled by agreements under collective bargaining in the industry more so than by legislation. We have always taken the position that any legislation which will improve standards of working men and women,—to favor it and foster it and support it. Fundamentally, we are opposed to legislation that controls the daily wage and conditions of employment. We think that is a relationship that should exist between employer and employee."

The Administrative Ruling.

The fact that the precise question here presented has been investigated and ruled upon by the governmental administrative agency charged with the enforcement of the Act, seems to me to be of paramount importance.

The evidence in this case shows beyond question that in July 1940 the Administrator of the Wage and Hour Division, Department of Labor, ruled that travel time of underground workers in the bituminous coal industry was not work time within the purview of the Fair Labor Standards Act. There is no suggestion that there has been any modification of this ruling. The Administrator was invited by plaintiff to intervene in this action, of which invitation he must have been aware, as his Regional Attorney was present in court throughout the trial and also attended the pretrial conference. I must therefore assume that the Administrator did not wish to retract or modify his ruling of July 1940.

Of course, an administrative ruling does not have the force of law. In one instance, where I was satisfied that an administrative ruling was plainly wrong, I declined

to follow it. *Magam* v. *Long's Baggage Transfer Co.*, D. C., 39 F. Supp. 742. However, as to such rulings, the Supreme Court has said:

"In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involved 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.' " *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 549, 60 S. Ct. 1059, 1067, 84 L. Ed. 1345.

"* * * it has been the settled law that, when uncertainty or ambiguity, such as we have here, is found in a statute, great weight will be given to the contemporaneous construction by department officials, who were called upon to act under the law and carry its provisions into effect * * *." *National Lead Co.* v. *United States*, 252 U. S. 140, 145, 40 S. Ct. 237, 239, 64 L. Ed. 496.

See also *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 53 S. Ct. 350, 77 L. Ed. 796; *Securities and Exchange Commission* v. *Associated Gas & Electric Co.*, 2 Cir., 99 F. 2d 795, 798; *Butte Miners' Union* v. *Anaconda Copper Mining Co.*, 112 Mont. 418, 118 P. 2d 148.

Consequently, I have generally followed such rulings. *Reliance Storage & Inspection Co., Inc.*, v. *Hubbard*, D. C., 50 F. Supp. 1012, 1014.

It seems to me that this particular administrative ruling is entitled to even more than the "great weight" to which the Supreme Court said such rulings were entitled generally, by reason of the thoroughness with which the Administrator went into the question before making his ruling. It appears from the evidence that the question first came to the attention of the coal operators through what was probably a routine investigation of the operating practices of the Monroe Coal Mining Corporation in Pennsylvania, made by a representative of the Wage and Hour Division to determine whether or not this company was complying

with the Act. After a thorough investigation, this investigator reported that in his opinion, travel time in the bituminous coal industry should not be considered as work time, but that, as travel time had been counted as work time in metal mining in the consent decree entered in the *Cornucopia Gold Mining case*, possibly it would be necessary to count travel time as work time in the bituminous coal mining industry. Upon learning of this situation, high officials of the coal operators association took the matter up with the president and high officials of the United Mine Workers of America, who all agreed, apparently without dissent, that the Act did not require the inclusion of travel time as work time, and that the Administrator should so rule. Representatives of the operators and of the Union expressed this view to various representatives of the Wage and Hour Division, and finally to the Administrator, Colonel Fleming himself. Colonel Fleming "indicated that if in this long period of collective bargaining in the mining industry that that (the face-to-face basis) was the basis upon which payment for work was agreed upon, that there wasn't any reason why he should wish to disturb it. He said that he felt that a bona fide arrangement of that kind of history of fifty years, certainly ought not to be disturbed, particularly after the description we had given him of the disturbance that would be occasioned in the industry by any such revolutionary change in its wage structure." However, Colonel Fleming did not then make a ruling, but referred the representatives of the operators and the Union to the Regional Director of the Office of the Wage and Hour Division in Philadelphia and his attorney. After conferring with these officials, the representatives of the coal operators and the Union wrote and delivered the letter of July 9, 1940, quoted from in my findings of fact, and which is generally referred to as the "Houck letter". Then, after receiving a report of this conference, Colonel Fleming made and announced the administrative ruling that in the bituminous coal industry, the Fair Labor Standards Act did not require the inclusion of travel time of underground workers as work time.

I do not find anything in this record which satisfies me that this ruling was plainly wrong; in fact, I find nothing which casts doubt upon its correctness. Giving to it the "great weight" to which the Supreme Court has said it is entitled, it is my conclusion to follow and sustain this ruling.

Case of *Tennessee &c.* v. *Muscoda &c.*

Defendants principally rely upon the case of *Tennessee Coal, Iron & R. Co. et al.* v. *Muscoda Local No. 123 et al.*, D. C., 40 F. Supp. 4; Id., 5 Cir., 135 F. 2d 320, and on rehearing, 5 Cir., 137 F. 2d 176. This also was a declaratory judgment action, for the determination of what constituted the work week of underground iron ore miners under the provisions of the Fair Labor Standards Act of 1938. The District Court considered separately whether—

(1) The time spent on the surface in obtaining and returning tools and equipment,

(2) travel time from the portal to and from the usual places of work, and

(3) the lunch period,—

constituted working time within the meaning of the Act, and concluded that (1) the time spent on the surface in obtaining and returning tools and equipment, and (2) travel time from the portal to and from the usual places of work, must, under the Act, be included in the employee's work week, and that (3), the lunch period, did not constitute working time and need not be included in the work week.

On appeal, the Circuit Court (one judge dissenting) affirmed as to (2) and (3), but reversed as to (1).

At the outset, it is interesting to note that the majority of the Circuit Court, especially in the opinion on rehearing, strictly confine their holding to the particular circumstances of that instant case, and that the majority holding was merely a refusal, "because not clearly erroneous, to set aside a finding supported by evidence as to what constituted working time of employees in the particular circumstances." 137 F. 2d at page 183. The Court said (137 F. 2d at page 183):

"In a supplemental brief, one of the appellants says that the effect of our decision, the plain and definite holding of the majority, is that as a matter of law the time consumed in traveling from the portal of the mine to the face and in returning therefrom to the portal 'must be included in the working time that makes up the work-week of every ore-mining employee within the meaning of Section 7 of the Fair Labor Standards Act'. We did not so hold, and such should not be the effect of our decision.

"We have written in vain if our opinion is to be interpreted as providing a rigid definition of working time, or as upholding the portal-to-portal theory as a matter of law, or as denying the principle that *in close cases it is well to afford the fullest possible scope to agreements among the individuals who are actually affected.* The evidentiary value of such agreements in relation to working time is for the jury or other fact-finding tribunal. We have expounded no rigid definition of working time.

"The Act fails to provide one, and we should not do what was deemed unwise to do by legislation. The Congress probably failed to define working time for the same reason that it refrained from attempting to define the regular rate of pay, namely, 'because the employment relationships to which the Act would apply were so various and unpredictable'.

"Appellants sought by declaratory judgment to obtain a rigid definition of working time favorable to them. They now chide us for laying down such a definition against them. We do not do either; *we merely refused, because not clearly erroneous, to set aside a finding supported by evidence as to what constituted working time of employees in the particular circumstances.* The Act of Congress in this respect differs from the legislation of those mining states that limit work-time in underground mines to eight hours per day, and that include in this reckoning all time spent underground." (Italics mine.)

Defendants do not here contend that lunch time is working time. They do contend that working time for the underground employees begins as soon as they are required to and do report at the portal, and continues until they return to the portal at the end of the shift, thus including all the time spent in obtaining lamps, tools or equipment, and other preparatory activities, as well as travel time.

As to the time spent in preparatory activities, estimated to consume here from three to ten minutes, I agreed with the majority holding in the *Tennessee Coal, Iron & R. Co. et al.* v. *Muscoda Local No. 123 et al. case, supra*, which is there set out as follows at page 323 of 135 F. 2d:

"With respect to time spent by employees checking in and out and procuring and returning tools, lamps, and carbide, the case stands differently. It appears that the workers were obliged to furnish their own tools, lamps, and carbide, and were free to exercise their own judgment as to when, where, and how they should procure their equipment. The company merely instructed them as to the equipment needed, and did not attempt further to regulate the matter. The checking system used by appellants required the employees only to deposit a metal disc at the tally house when arriving for work, and to pick it up again at the end of the shift. In addition to the practical difficulties incident to the computation of isolated moments so elusive in character, we think these pursuits should not be computed as work-time, since they fall within the category of duties incident to qualifying the employee to perform his work rather than within the scope of his actual employment."

As to travel time, I do not agree that the majority holding in the *Tennessee Coal, Iron & R. Co. et al.* v. *Muscoda Local No. 123 et al. case, supra*, should be applied here, as contended by counsel for defendants. In the first place, the weight of the *Tennessee Coal, Iron & R. Co. et al.* v. *Muscoda Local No. 123 et al. case, supra*, is considerably lessened by strong dissent of Sibley, Senior Circuit Judge, in which, in part, he said:

"The Act does not define 'work time' or even 'work'. It may apply to each and every industry. What would be work in one industry may not be in another. It seems to me that a man is at work, for the purposes of the Act, when he is doing what he is hired to do. It may involve mental or physical effort, or it may consist in simple presence. It all depends on the contract of hiring. The Act did not intend to upset and nullify the wage contracts of force in the various industries. It simply fixed minimum wages for work done under them, and maximum hours. Of course contracts yield to the Act on these points, but they still control as to the work to be done, and the way it is to be done, and as to the scale of pay if not less than the minimum fixed by the Act. These things are left to bargaining, and especially to collective bargaining under the principles of the National Labor Relations Act, 29 U. S. C. A., § 151 *et seq.*

"No question is older in such bargaining than the question whether 'travel time' is to be included in 'work time'. The worker has always thought he ought not to lose all of the time necessary to go to and from his place of work; the employer has thought he ought not to pay for time that produces no work results. The dispute has been resolved in various ways in employment contracts for pay estimated by the hour. Plumbers demand and get pay from the time they leave their places of business to go to a job until they return. Railroad trainmen get pay from the time they report for duty, no matter what delay may occur in the starting of the train. Railway trackmen also are paid from the hour of their assembly at the section point, though they may ride their motor car for miles before doing any track work. On the other hand carpenters, masons, and most artisans and laborers are paid for work only after they take up their tools on the job. As to coal and iron ore miners, traditionally they have been paid according to production, but their modern contracts have always included an express agreement as to their work time, and that agreement has excluded from work time the travel time in reach-

ing the coal seam or ore bed, which were agreed to be the place of work. This is true of the collective bargains made by strong unions throughout the Appalachian region, as it is true of the bargains under which the miners in this case have worked. Their work time is agreed to be that spent at the ore bed. The employers' arrangement to get them to that place reliably and safely is primarily for the benefit of the miner and is not work for the employer, according to these agreements. The discomforts and dangers of the trip, as well as the loss of time, are all considered in fixing the rate of pay for the work of extracting the ore, and the pay scales here involved are far above the minimum fixed by the Act. The miner's work is hard and dangerous, but his pay is supposed to compensate for all this. If it would be better to include travel time in work time, it ought to be done by a new bargain in which rates of pay are also reviewed. If the change is to be by a special statute (some western States have such statutes), it will operate justly in *futuro*, and not by unexpected penalty, as here.

"There is nothing in the Act to outlaw agreements that travel time in getting to or from the agreed place of work is not work time. This is true though the employer may organize a means of transportation and make rules for its use. The agreements here that work time includes only time at the face of the ore bed are not illegal. Digging out the ore is what the miners agree to do, and for that they are paid. Getting their tools together and riding or walking to the agreed place of work is not, by force of any law, work done for the mine owner. No one, I suppose, would say that if a group of miners who had spent an hour riding to work decided of their own will not to dig any ore and spent another hour riding back, they had done any work for which they should be paid by force of the Act."

However, conceding the correctness of the decision of the majority in the *Tennessee Coal, Iron & R. Co. et al.* v. *Muscoda Local No. 123 et al. case*, it seems to me that this decision is clearly distinguishable from the instant case and

not in point here. In deciding the issue as to travel time, the District Court in its conclusions, and the Circuit Court on appeal, relied upon certain controlling considerations.

First, there it appeared that the Administrator of the Wage and Hour Division, United States Department of Labor, had recently ruled that in the metal mining industry, travel time was work time, and furthermore, the Administrator there intervened and made substantially the same contentions as did the several defendants. Here, the situation is precisely the converse. In July, 1940, the Administrator announced his ruling that in the bituminous coal industry, travel time was not necessarily work time under the Act, and there has been no subsequent modification of this ruling. And as has been heretofore mentioned, although plaintiff in its complaint asserted that the Administrator was interested in the construction and application of the Act and invited his timely intervention in this action, the Administrator has neither sought to intervene nor appear as an *amicus curiae*, although his Regional Attorney was in attendance throughout.

Second, there it did not appear to the satisfaction of the court that by established usage throughout the industry, travel time was uniformly excluded from the work-week. It does appear here, beyond any question, that travel time has never been considered as, or included in, work time by anyone in the bituminous coal industry in this country. On the contrary, for certainly the past fifty years, the "face to face" basis has been universally recognized in the bituminous coal industry as the basis for computation of work time.

Third, there, the court concluded that although it be conceded that recent wage contracts did exclude travel time from the work week, such contracts were not free and uncoerced agreements on the part of the mine workers, but reflected the dictation of the employers and the inability of the employees and their union to obtain recognition of their right, as repeatedly asserted and contended for, to be paid

for their underground travel time. Here, we have the word of both the operators and the Union that as to the "face to face" basis, "This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years, and is the result of collective bargaining in its complete sense." On this point, an excerpt from the brief of counsel for the iron miners in the *Tennessee Coal, Iron & R. Co. et al.* v. *Muscoda Local No. 123 et al. case,* on appeal, is quite interesting (p. 59):

"We are not trying the case of coal miners. We are not experts on coal mining. We do know that there are two great differences between the coal mining situation and the mining of iron ore in Jefferson County. *In coal mining we find a union which has been strong and powerful and which as a union has been engaged in collective bargaining with the coal operators over a long period of years. In our case we find the efforts of the men to organize their union presents a pitiable picture of helplessness against the domination of the mining companies.* In coal mining the men work seven hours per day. At no point in the voluminous record created by the appellants do we find a single ore mining company offering to pay its men on a seven hour day." (Italics mine.)

The record in this case by no means discloses "a pitiable picture of helplessness against the domination of the mining companies". On the contrary, the record here does disclose the picture of the "strong and powerful" union mentioned by counsel, which is able and willing, when it feels aggrieved, even in time of war, to paralyze the production of bituminous coal in this country by a strike, or, in the euphemistic language of its members, "a work stoppage while awaiting a contract". It is hardly likely that such an union has been coerced by the coal operators into waiving any valuable monetary right to which its members were entitled by law.

Fourth, there the court found that the underground travel was under conditions peculiar to the mining of iron ore which were replete with hazards, highly uncomfortable and requiring physical exertion, due largely to overcrowding of cars, and which were unpleasant and disagreeable because of bad odors, heat and poor ventilation, and were burdensome to those encountering them. Here, although I have not found that the "man-trips" constituted pleasure excursions, I have found no such painful and burdensome conditions as those described in the iron ore mines.

For the reasons set out above, it appears to me that the *Tennessee Coal, Iron & R. Co. et al.* v. *Muscoda Local No. 123 et al. case* is clearly distinguishable from the instant case, and should not govern, conceding that the *Tennessee Coal, Iron & R. Co. et al.* v. *Muscoda Local No. 123 et al. case* was correctly decided by the majority.

Other cases involving the question of travel time in other industries under various circumstances and in the light of various statutes have been cited and discussed by counsel for both sides. It does not seem to me that they are sufficiently pertinent to the particular situation here presented, to warrant a discussion of them herein.

Contemporaneous Construction and Agreements by the Parties.

The proposition, that contracts made in violation of the Fair Labor Standards Act, or any other valid Act of Congress, are ineffective as against the Act, is too plain to require the citation of authority. And it is equally true that custom and usage, no matter of what long standing, cannot prevail against an Act of Congress. As well stated by counsel for defendants here, acts of Congress are frequently designed to change customs and usages which are deemed unfair, harsh and oppressive. Nor can contemporaneous understandings or constructions of the act by the interested parties alter its plain terms.

However, in this case, the plain terms of the Act do not cover the precise situation here presented. The question of when travel time is work time, and when it is not, is a question which may require a diversity of answers in diverse situations, as pointed out by Judge Sibley in the *Tennessee Coal, Iron & R. Co. et al.* v. *Muscoda Local No. 123 et al. case, supra,* 135 F. 2d at page 323 thereof. It is quite true, as urged by defendants' counsel, that that which is plain requires no interpretation and presents no occasion for the use of extrinsic aids to its construction, but I cannot agree with their contention that the plain language of the Fair Labor Standards Act requires inclusion of travel time as work time. It seems to me that the language of the Act relied upon by defendants *quoad* travel time falls far short of sustaining their contention in plain terms. In such a situation, it seems to me some of the very cases cited and relied upon by defendants' counsel recognize the principle that extrinsic aid should be sought.

"Long-continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute, but cannot alter provisions that are clear and explicit when related to the facts disclosed." *Louisville & N., etc., Co.* v. *United States,* 282 U. S. 740, 759, 51 S. Ct. 297, 304, 75 L. Ed. 672.

"The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it." *Hamilton* v. *Rathbone,* 175 U. S. 414, 419, 20 S. Ct. 155, 157, 44 L. Ed. 219.

In this case, more than 400 employees travel from their homes to the mines in trucks and buses operated by the

company. If they are entitled to pay for the time spent in traveling from the portal of the mine to their usual places of work, might it not also be contended that they are entitled to pay for the time spent in travel from the points where they board the trucks and buses to the mines? If "surrender of freedom of action" be any criterion, as contended by defendants' counsel, do not these employees surrender their "freedom of action" when they become passengers on plaintiff's vehicles?

It does therefore seem important to inquire into the customs and usages of the industry, the contracts and agreements made between the parties, and the contemporaneous construction placed upon the Act by the interested parties. The evidence shows beyond question that, in the bituminous coal industry in this country, for the past fifty years, travel time of underground workers has not been considered work time. By the NIRA Code for the bituminous coal industry, travel time was definitely excluded from work time. By the precise terms of all subsequent contracts between plaintiff and defendants, and between employers and employees generally in the bituminous coal industry, travel time has been excluded from work time.

But the defendants contend that the last contract expired March 31, 1943, and that thereafter, in the absence of contract, the Fair Labor Standards Act applied, and that by virtue thereof travel time became work time. Defendants, by an amended answer, have disclaimed any compensation for overtime prior to April 1, 1943. Plaintiff contends that the contract, which by its terms was to expire March 31, 1943, was continued in force by the parties pursuant to directives of governmental agencies. Certainly, the parties continued to operate under the contract of April 1, 1943, to the time of the institution of this action. However, it seems to me that the question of whether or not this contract was continued in force and remained binding upon the parties during this period is neither important nor material. If the Fair Labor Standards Act, from its effective

date, required the inclusion of travel time as work time, it did so irrespective of contract, and if there was a contract to the contrary, the contract would be ineffective as against the Act.

What does seem to me important and controlling is that by the universal custom and usage of the past fifty years, and by agreement of the parties in every collective bargaining agreement which was ever made, it was universally recognized that in the bituminous coal industry, travel time was not work time. And this is the condition which prevailed when the Fair Labor Standards Act was enacted in 1938, and of which it must be presumed Congress was aware.

"It is now a settled principle of statutory construction that Congress or a legislature in legislating with regard to an industry or activity, must be regarded as having had in mind the actual conditions to which the act will apply, that is, the needs and usages of such activity." *United States* v. *Turner Turpentine Co.*, 5 Cir., 111 F. 2d 400, 404.

"Usages long established and followed have, to a great extent, the efficacy of law in all countries. They control the construction and qualify and limit the force of positive enactments." *Slidell* v. *Grandjean*, 111 U. S. 412, 421, 4 S. Ct. 475, 478, 28 L. Ed. 321.

The contemporaneous construction of the Act by the interested parties in the bituminous coal industry could not possibly appear more clearly nor fully than as set out in the letter of July 9, 1940, written to the Administrator by responsible representatives of the coal operators and the United Mine Workers jointly, and usually referred to as the "Houck letter". In this letter, not only is there no suggestion that by the terms of the Fair Labor Standards Act, travel time must be included in working time; on the contrary, it is positively asserted that any change from the traditional "face to face" basis would "result in complete chaos, and would probably result in a complete stoppage of work at practically all the coal mines in the United

States"; and "moreover", that "the very purpose of the Fair Labor Standards Act would be defeated" by such a change.

This entire letter is so illuminating that I append it in extenso as a footnote hereto.[1]

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[1]

1617 Pennsylvania Boulevard
Philadelphia, Pennsylvania
July 9, 1940

Col. Philip B. Fleming, Administrator,
Wage and Hour Division,
Department of Labor,
Washington, D. C.

Dear Mr. Administrator:

As a result of certain investigations which have been conducted by the Wage & Hour Division at bituminous coal mines in Pennsylvania, particularly at the Revloc shaft of the Monroe Coal Mining Company, and a conference that has been held by your Supervising Inspector, Mr. Caffey, at Pittsburgh, Pa., with a committee of the Western Pennsylvania Coal Operators' Association, concerning the application of the Fair Labor Standards Act to the bituminous coal mining industry, certain questions have arisen that are disturbing to both employers and employees within the industry. These uncertainties have been continuing for some time and are causing much concern to the mine workers and the mine operators, especially with reference to "travel time."

Today, the Negotiating Committee of the Appalachian Wage Conference, namely: Messrs. J. D. A. Morrow, President of Pittsburgh Coal Company; L. T. Putnam of the Raleigh Wyoming Mining Company, Beckley, W. Va.; L. C. Gunter, of the Southern Appalachian Coal Operators' Association, Knoxville, Tenn.; Charles O'Neill, President of the United Eastern Coal Sales Corporation, New York City; C. E. Cowan, Vice President of Monroe Coal Mining Company; Frederick H. Knight, counsel for Monroe Coal Mining Company; W. L. Robison, President of the Youghiogheny & Ohio Coal Company and Chairman of the Appalachian Wage Conference on the one hand, and M. Earl E. Houck, Director of the Legal Department of the United Mine Workers of America, met with Mr. Dorsey, Regional Director, Philadelphia, Pa., and Mr. Gallagher, Regional Counsel, Philadelphia, Pa., at which time these questions were discussed at length, particularly the application of the Act as to the question of hours of work in the bituminous coal industry.

The mine workers and the mine operators present presented their views to representatives of the Wage & Hour Division as to the provisions of the Appalachian Wage Agreement covering maxi-

Presumably Congress refrained from attempting such a definition because the employment relationships to which the Acts would apply were so various and unpredictable. And that which it was unwise for Congress to do, this Court should not do. *When employer and employees have*

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mum hours and working time. We have filed with the Division copy of the Appalachian Wage Agreement, and the entire provision as to maximum hours and working time is included therein. The pertinent language, however, is "Seven hours of labor shall constitute a day's work. The seven-hour day means seven hours' work in the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis * * *." The Appalachian Wage Agreement is the basic agreement for the bituminous mines in the States of Pennsylvania, Ohio, West Virginia, Virginia, Eastern Kentucky, Southeastern Tennessee and Maryland. In this territory there are several thousand rail shipping mines employing from 300,000 to 325,000 men, and some twenty-three operating districts. Each of the districts work out a local wage agreement covering its own territory, subject, however, to the provision that it must include within it all of the provisions of the Appalachian Agreement. The mines in the Appalachian region produce 70% of the total bituminous coal produced in the United States annually. Also, the Appalachian Agreement is used by the United Mine Workers of America as the basic agreement upon which the district agreements of the remaining 30% of the country is predicated.

The United Mine Workers of America and coal operators of the United States have been negotiating wage agreements for a period of fifty years. The Appalachian Agreement, covering as it does a great number of men and mines, has been worked out over that period of time and covers within its general provisions myriad wage rates, conditions of work, and hours of employment. This agreement, with its twenty-three supplemental agreements, constitutes a whole document. In those conferences, of course, hours of work has been one of the principal matters of consideration during this period of time. Hours of work with wage rates constitute the heart of any such agreement. In this basic industry we have provided for seven-hour days, five-day weeks, thirty-five hours per week, with high rates of pay. The basic inside day rate in the North is $.857 per hour, and in the South it is $.80 per hour. The underground workers are paid on this basis with maximum rates for mobile loading machine operators, approximately $1.09 per hour. In addition, the agreement provides, "work by mine workers paid by hour or day in excess of seven hours in one day, or thirty-five hours in any one week, shall be paid for it at the rate of time and one-half * * *." It is our opinion that these sub-

*agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text * * *." Walling* v. *A. H. Belo, etc.*, 316

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stantive provisions of the agreement are among the highest standards of labor provided in any industry in the United States, both as to hours of working time and as to wages paid. There is full and complete understanding in the industry between employer and employees as to the application of these provisions. This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years and is the result of collective bargaining in its complete sense.

There are many reasons why the provision as to working time has been set out as provided by this agreement. The impracticability of measuring time by any other method is inherent in the very nature of mining coal. Coal mines are sometimes very extensive. When they are first opened up, the working places are, of course, close by and near to the opening of the mine. In such cases there is no problem of either transportation of the men to the working places or time consumed in reaching them; but as mines grow older, the working places move farther and farther away from the portal or opening of the mine, and as such conditions develop, it becomes necessary for provision to be made for transportation of the men over long distances to their working places. This is usually provided by what is known in the industry as "man trips." These trips are scheduled to leave the outside or opening of the mine at a certain hour, so that all the employees will reach their working places by the hour at which work regularly begins at the working places throughout the mine, and these trips are also scheduled to leave the inside of the mine when the day's work is done, at the conclusion of the seven-hour period of work at the working places. Among other provisions of the agreement, there is provided a time for starting the day's work and a lunch period, as well as a time for expiration of the work day. There is some variation in this, depending upon local conditions as to the starting and quitting time at the various collieries. The agreement provides for a certain tolerance. In any event, the starting and quitting time are no more than seven hours apart, exclusive of the lunch period.

In the many conferences that have been held over this period of fifty years, naturally all manner of suggestions and proposals for amplification or amendment of the agreement has been made both by the mine workers and the operators.

The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual

U. S. 624, 634, 62 S. Ct. 1223, 1229, 86 L. Ed. 1716. (Italics mine.)

Conclusions.

For the reasons set out above, my conclusions of law are:

(1) That the Fair Labor Standards Act of 1938 does not require that there be included within the work week of

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working place. Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898.

It is urged that any ruling requiring such a change in the custom, tradition, and contract provision so as to change the work day from "seven hours' work in the mines at the usual working places" to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated. In such an event, it would make necessary the reassembling of the Appalachian Joint Wage Conference and it would be faced with an issue that would be almost impossible of solution by agreement, resulting in an industrial conflict that could paralyze the nation. This would be a most unhappy result to flow from an act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and the high rates of pay in the bituminous coal mines. The great amount of money involved in the case of extra payment by the operators or the great changes that would be required in the rates of pay to the miners, should any change in the present contract be necessary by reason of a new standard for the measurement of time worked, is so serious that a negotiated adjustment would seem to be impossible.

For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, and the definition of working time, as set forth in the Appalachian Agreement (which embodies the custom and traditions of the bituminous mining industry), as complying both with the provisions of the Fair

underground workers in plaintiff's mines, either time spent by such employees outside the portal of the mines before entering therein, or time spent in traveling from the portals to their usual places of work and return.

(2) That plaintiff, in computing the work week of its underground employees on the basis of hours of work in the mines at their usual working places, exclusive of the lunch period, and the time spent outside the portals and travel time from the portals to their usual working places and return, as provided in the effective wage agreements and continuations thereof, and in paying its underground workers for their services on that basis, has complied with and discharged all its obligations imposed upon it by the Fair Labor Standards Act of 1938.

An order will be entered declaring the rights of the parties in accordance with the above conclusions, and dismissing this action at the costs of the defendants.

Labor Standards Act and of Interpretive Bulletin No. 13, to the effect that "reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act."

We therefore respectfully request that your Division issue a supplement to Interpretive Bulletin No. 13, stating that the standard of wages and hours of work, and definition of working time, set forth in the Appalachian Agreement, entered into on May 12, 1940, between twenty-three district associations of bituminous coal operators comprising the Appalachian coal producing area and the International Union, United Mine Workers of America, and the several district agreements based thereon, conform to and satisfy the requirements of the Wage & Hour Act.

Respectfully submitted,

For the United Mine Workers of America:
s. EARL E. HOUCK,
Director of the Legal Department.

For the Operators:
s. W. L. ROBISON, Chairman,
s. CHARLES O'NEILL,
s. L. T. PUTNAM,
s. L. C. GUNTER,
s. J. D. A. MORROW,
Appalachian Joint Conference Negotiating Committee.

UNITED STATES CIRCUIT COURT OF APPEALS

Fourth Circuit.

No. 5246.

Local No. 6167, United Mine Workers of America, an unincorporated association, affiliated with the International Union, United Mine Workers of America, et al., *Appellants*,

v.

Jewell Ridge Coal Corporation, a Corporation, *Appellee*.

Appeal from the District Court of the United States for the Western District of Virginia, at Roanoke.

(Argued June 28, 1944. Decided October 6, 1944.)

Before Parker, Soper and Dobie, Circuit Judges.

Crampton Harris (Welly K. Hopkins, Frank W. Rogers and Leonard G. Muse on brief) for Appellants; George Richardson, Jr., and William A. Stuart (Penn, Stuart & Phillips, and Richardson & Kemper on brief) for Appellee; and John C. Gall (E. R. Burke on brief) for Southern Coal Producers Association, as amicus curiae.

Parker, Circuit Judge:

This is an appeal in a suit instituted to obtain a declaratory judgment to the effect that the Fair Labor Standards

Act of 1938 does not require that "travel time" from "portal to portal" be included in the "work week" of miners in bituminous coal mines. Plaintiff is the owner and operator of two mines in western Virginia employing around 900 miners. It brought a class action against two local unions of the United Mine Workers of America and certain of their officers and members. An answer filed on behalf of the defendants denied plaintiff's right to the relief asked and by way of counterclaim asked recovery under the Fair Labor Standards Act for additional wages for work done between April 1, 1943 and June 20, 1943. The District Court rendered judgment for plaintiff and the defendants have appealed. The facts are fully stated in the opinion of the District Court. *Jewell Ridge Coal Corporation* v. *Local No. 6167, etc.*, 53 F. Supp. 935.

In view of the long established custom in the coal industry not to include travel time in the work week, the collective bargaining contracts extending over a long period recognizing the "face to face" basis of pay, the testimony before the committees of Congress, the reason and purpose of the Fair Labor Standards Act and the probable effects and consequences of construing the act to require travel time in bituminous coal mines to be included in the work week, there is strong reason for thinking, as everyone connected with the matter seems to have thought until recently, that it was not the intent of Congress that the act should be so construed in its application to the coal mining industry. The reasons in support of this conclusion are fully and ably set forth in the opinion of the learned judge below and need not be repeated. They would be convincing, were it not for the decision of the Supreme Court in *Tennessee Coal Iron & R. Co.* v. *Muscoda Local No. 123 etc.*, — U. S. —, 64 S. Ct. 698, which we do not think can be distinguished in principle from the case at bar.

A distinction is attempted on the ground that the travel time involved in the *Muscoda case* involved travel in an iron mine and the trial judge had found that it was properly in-

cluded in the work week, whereas the travel time here involved is in a coal mine and the trial judge has found it not properly included. This, however, is a distinction without a difference. The record leaves no doubt that travel to the working face in a coal mine is substantially the same sort of thing as travel to the working face in an iron mine; and, while the Supreme Court in the case before it made reference to the findings below, it is clear from the opinion that, irrespective of the findings, the court was of opinion that travel of the sort here involved should be considered work within the meaning of the statute and included within the work week. The court said in this connection:

> "We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner. Accordingly we view Sections 7(a), 3(g) and 3(j) of the Act as necessarily indicative of a Congressional intention to guarantee either regular or overtime compensation for all actual work or employment. To hold that an employer may validly compensate his employees for only a fraction of the time consumed in actual labor would be inconsistent with the very purpose and structure of those sections of the Act. It is vital, of course, to determine first the extent of the actual work week. Only after this is done can the minimum wage and maximum hour requirements of the Act be effectively applied. And, in the absence of a contrary legislative expression, we cannot assume that Congress here was referring to work or employment other than as those words are commonly used—as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.
>
> "Viewing the facts of this case as found by both courts below in the light of the foregoing considerations, we are unwilling to conclude that the under-

ground travel in petitioners' iron ore mines cannot be construed as work or employment within the meaning of the Act. The exacting and dangerous conditions in the mine shafts stand as mute, unanswerable proof that the journey from and to the portal involves continuous physical and mental exertion as well as hazards to life and limb. And this compulsory travel occurs entirely on petitioners' property and is at all times under their strict control and supervision.

"Such travel, furthermore, is not primarily undertaken for the convenience of the miners and bears no relation whatever to their needs or to the distance between their homes and the mines. Rather the travel time is spent for the benefit of petitioners and their iron ore mining operations. The extraction of ore from these mines by its very nature necessitates dangerous travel in petitioners' underground shafts in order to reach the working faces, where production actually occurs. Such hazardous travel is thus essential to petitioners' production. It matters not that such travel is, in a strict sense, a non-productive benefit. Nothing in the statute or in reason demands that every moment of an employee's time devoted to the service of his employer shall be directly productive. Section 3(j) of the Act expressly provides that it is sufficient if an employee is engaged in a process or occupation necessary to production. Hence employees engaged in such necessary but not directly productive activities as watching and guarding a building, waiting for work, and standing by on call have been held to be engaged in work necessary to production and entitled to the benefits of the Act. Iron Ore miners traveling underground are no less engaged in a 'process or occupation' necessary to actual production. They do more than 'stand and wait'. *Missouri, K. & T. R. Co.* v. *United States*, 231 U. S. 112, 119, 34 S. Ct. 26, 27, 58 L. Ed. 144, Cf. *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, 158, 48 S. Ct. 221, 222, 72 L. Ed. 507, 66 A.L.R. 1402. Theirs is a fossorial activity bearing all the indicia of hard labor."

That the decision of the Court was understood by the Court itself to be based upon the underlying facts of the

case and not merely upon the interpretation which the lower courts had placed upon those facts, is shown by the concurring opinions, which stressed the interpretation made in the findings of the lower courts. If the interpretation of the facts in these findings had been the controlling consideration in the majority opinion, there would, of course, have been no occasion whatever for the concurring opinions. Furthermore, where the facts of two cases are substantially the same, the law should not be applied differently because trial judges have looked at them in a different way. The record shows that travel in an iron mine is the same sort of thing as travel in a coal mine. The findings of the trial courts as to whether upon the basic facts travel time was part of the work week within the meaning of the statute were mere conclusions involving mixed questions of law and fact; and, the basic facts being the same, an appellate court cannot distinguish cases on the basis of such conclusions. In such case, the difference in conclusions involving mixed questions of law and fact is necessarily attributable to a difference in views as to the law or its application.

Equally vain is the attempt to distinguish the Supreme Court's decision on the ground that no such custom or bargaining agreements existed in the case of the mining of ore as are shown in the case before us. The Supreme Court decided the point on two grounds: (1) that the custom and agreements relied on were not sufficiently shown, and (2) that they were immaterial in any event. After commenting on the failure of the lower court to find "immemorial" custom or collective bargaining agreements and saying that the lower court's findings with regard thereto were not so clearly erroneous as to require that they be disregarded, the Supreme Court went on to say:

> "But in any event it is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the workweek or

not to compensate employees for certain portions of their work. The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him for only a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be untilized to deprive employees of their statutory rights."

And in a note to the passage above quoted, the Court said:

"Congress was not unaware of the effect that collective bargaining contracts might have on overtime pay. It expressly decided to give effect to two kinds of collective agreements, as specified in Section 7(b) (1) and (2) of the Act. Cf. Section 8(c). It thus did not intend that other collective agreements should relieve employers from paying for overtime in excess of an actual workweek of 40 hours, regardless of the provisions of such contracts."

What the majority of the court has thus so clearly said we are not at liberty to ignore. It is no answer that the case might have been decided on the ground that the evidence as to custom and contract was insufficient. The court chose to place its decision on the additional ground that custom and contract were immaterial; and it is settled beyond controversy that in such case the decision is binding authority as to both of the grounds upon which it is based. *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 340; *United States* v. *Title Ins. Co.*, 265 U. S., 472, 486; *Union Pac. R. Co.* v. *Mason City Co.*, 199 U. S. 160, 166; 14 Am. Jur. 298.

Nor is anything said in the concluding paragraph of the Supreme Court's opinion upon which a distinction can be

based. This is not a case "where precisely accurate computation is difficult or impossible", nor is it one of the "borderline cases where the other facts give rise to serious doubts as to whether certain activity or non activity constitutes work or employment". Cf. dissenting opinion of Judge Sibley in the *Muscoda case*, 135 F. 2d at 323. What is involved is just the sort of activity as was held by the Supreme Court to "leave no uncertainty" as to its character as "work".

Under the circumstances, there is nothing for us to do but reverse the decision below. If it is thought that the decision of the Supreme Court should be overruled or limited so as not to apply to a case of this character, that is a matter for the Supreme Court and not for us.

The disturbing effect of the decision here will not be so great as it otherwise would, in view of the fact that, by agreement between the miners and operators, the portal to portal system of computing the work week has now been adopted in the industry. An amended answer filed in the cause waives the right to additional wages due under the act prior to April 1, 1943, the date of the expiration of the contract between the union and the operators; and the amount claimed as additional wages between April 1st and June 20th, 1943, is only the amount voluntarily awarded the workers in other mines as a result of the settlement arrived at when the "portal to portal" basis was adopted. The mines of plaintiff were excluded from the terms of that settlement, as we understand, so that the right to an adjudication of the questions here involved would not be affected.

For the reasons stated, the judgment appealed from will be reversed and the cause will be remanded for further proceedings not inconsistent herewith.

Reversed.

SOPER, CIRCUIT JUDGE, dissenting:

If certain statements in the opinion in *Tennessee Coal Co. v. Muscoda Local*, 321 U. S. 590 are viewed apart from their setting, a reversal of the judgment in the pending case in favor of the mine operators may perhaps be logically deduced; but a reversal will produce a result so inequitable that we may well inquire whether we should not discard formality and adopt a realistic attitude in resolving the issue, as we are admonished to do in cases of this sort in the opening sentences of that opinion.

In the pending coal mine case, unlike the *Tennessee case* where conditions in iron ore mines were under consideration, it was found by the District Court upon undisputed evidence that "by the universal custom and usage of the past fifty years and by agreement of the parties in every collective bargaining agreement that was ever made, it was universally recognized that in the bituminous coal industry travel time was not work time". In short, the court found that in the coal mining industry the term "workweek" had come to have the definite meaning of time spent at work at the face of the mine exclusive of travel time; and from this finding the conclusion naturally followed that the term should be given this significance in the application of a statute which does not define the term at all.

This conclusion is now said to be erroneous because in the later decision in the Tennessee case, where the District Court had failed to find any such immemorial custom or collective bargaining agreements, the Supreme Court said (p. 602), that "in any event it is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the work week." While this language was used with respect to the different conditions then prevailing in the metal mining industry, it is now taken to mean that custom or contract, no matter how long or how firmly established, must be disregarded in fixing the limits of the work week in all industries.

This line of reasoning produces such an injustice in the pending case that I am loath to believe that it represents a correct interpretation of the statute or the conclusion which the Supreme Court itself would reach if the pending case were before it. In this case we do not have the picture portrayed in the opinions in the earlier suit of miners struggling against difficulties to obtain the best terms they could get and making repeated unsuccessful attempts to be paid in whole or in part for travel time, where in short travel time was not excluded from work time with the miners' free and uncoerced consent, and the District Court consequently found that there was no custom so well established that Congress must have adopted it or had it in mind when it used the term "workweek" in the statute, nor do we have such a decision as that rendered by the Administrator of the Wage and Hour Division of the United States Department of Labor on March 15, 1941 in respect to the metal mining industry that work time starts when the miner reports for duty at the collar of the mine and ends when he reaches the collar at the end of the shift. See 40 F. Supp. 7, 8, 10; 135 F. 2d 322, 323, and 321 U. S. 601.

Quite the contrary has been the situation in the coal mining industry. Not only was there a custom of fifty years' standing, repeatedly embodied in successive collective bargaining agreements, but the custom had the affirmative approval of the powerful union known as the United Mine Workers of America which had been eminently successful in representing the miners' interests. The "face to face" basis for the computation of working time has been traditional in the industry. When the Code of Fair Competition under the National Industrial Recovery Act was drawn up for the industry by representatives of the operators and of the United Mine Workers and approved by the President of the United States in 1933, it provided that the work day should consist of seven hours' work at the face of the mine. Basic wage agreements for the industry executed

by the operators and by the union in 1934, 1935 and 1937 incorporated this provision. Even after the Fair Labor Standards Act passed on June 25, 1938 had become effective in accordance with its terms on October 23, 1938, the same provision was retained in the basic agreement of May 12, 1939 for the period of two years; and it was repeated in a succeeding two year agreement executed on April 1, 1941.

It must not be supposed that this method of computing wages was imposed upon an unwilling union by the superior power of management. It was deemed by both parties to be beneficial to their respective interests as a practical solution of the perplexing questions which would otherwise arise in applying a general wage agreement to a large number of mines in which the travel time necessarily varied on account of diverse physical conditions. This was strikingly shown in 1940 in the course of an investigation of the industry by the Office of Wage and Hour Administration when the representatives of the operators and the representatives of the union on July 9, 1940 united in a letter urging the administration to recognize the traditional contract provision as conforming to the statute. They pointed out that the wage agreements in effect afforded "the highest standards of labor provided in any industry in the United States both as to hours of working time and wages paid"; and they expressed the opinion that the adoption of the "portal to portal" system "would create so much confusion in the bituminous coal industry as to result in complete chaos". The administration acceded to this view and on July 18, 1940 gave out the opinion that "the practice of computing working time on a face to face basis in the bituminous coal industry would not be unreasonable". It was under this state of affairs that the two year agreement of April 1, 1941 was executed.

It was not until March, 1943, during the negotiations for a new contract to take effect April 1, 1943, that the union suggested that in order to conform with the basic and legal

requirements for the industry the maximum hours and working time provisions of the contract should be so phrased as to establish portal to portal for starting and quitting time for all underground workers. But even then it was obvious that the portal to portal basis was proposed in order to justify a flat $2 a day wage increase for all workers because the increase was demanded for all classifications of outside as well as inside day men.

The negotiations were not successful although prolonged conferences were held in an effort to reach an agreement and the dispute was referred to the War Labor Board. There were strikes which resulted in the seizure of the mines by the federal government and intermittent work periods during which the industry operated under the conditions specified in the 1941 agreement. Finally the Secretary of the Interior, representing the government, and John L. Lewis, representing the miners, reached an agreement on November 3, 1943 which included the portal to portal method of measuring work time. Subsequently the greater part of the industry yielded and entered into agreements on the lines of the Ickes-Lewis agreement.

This change of front on the part of the miners for bargaining purposes, when making an agreement for future operations, could not affect the condition which formerly existed in the industry or transform into work time that which was not work time in the generally accepted meaning of the term that had prevailed in the industry for a long time when the statute was passed and that continued to prevail with administrative sanction for five years after its enactment. The statute could not have one meaning in the earlier and another meaning in the later period; and the Mining Company was justified in resisting in this suit the application of the portal to portal method of computation for work done by the miners even after the 1941 agreement had expired.

It seems a mistake to suppose that under no circumstances can custom or agreement throw any light on the meaning of the Act in its bearing upon an industry. The

language of the Supreme Court in the Tennessee case should not be given this sweeping significance as the decisions of the courts tend to show. For example, it was held in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, that in the statutory sense the regular rate of pay for any particular week is the quotient of the amount paid per week divided by the number of hours worked in that week, and that overtime must be calculated on this basis, and unless this is done, it is not sufficient that the wages actually paid exceed the statutory minimum; but, on the other hand, it was held in *Walling* v. *Belo Corp.*, 316 U. S. 624, that an employer could continue to pay his employees the same weekly salaries without violating the Act because he rearranged the basis of compensation by an agreement which provided for a basic rate of pay per hour for the maximum hours fixed by the Act and one and a half times that rate per hour for overtime together with a guarantee that the employee should receive each week for regular time and overtime not less that a stipulated amount. In view of these decisions, it is obvious that the legality of rate of pay may depend upon an agreement of the parties.

It is suggested in mitigation of the harsh effect of a decision adverse to the Mining Company that the amount claimed by the miners in this case has been limited, by amendment of the counterclaim, to the period beginning April 1, 1943 and ending June 20, 1943. Indeed it is assumed in the briefs that each miner's claim is limited to the sum of $40 and that the total sum involved is approximately $40,000. These statements cannot be verified in the record. The amendment to the counterclaim is not limited to the period ending June 20, 1943 but contains merely the assertion that the miners will not further assert their claims to travel time prior to March 31, 1943. The end of the period for which the claim is made is not stated; nor is the amount of the claim defined. The assumed limitation of the period to June 20, 1943 and to the sum of $40 per miner seems to be based on the terms of agreements entered into between the union and other mining corpora-

tions; but so far as the record discloses, the Jewell Ridge Coal Corporation has never entered into a new agreement or paid for travel time. If a claim is asserted for the full amount due under the Act, as now interpreted by the miners, a very much larger sum than $40,000 will be involved in this controversy.

Moreover, the decision may be of grave importance in its application to other mine owners who have not dealt with the union or have not signed wage agreements. If the new interpretation of work time is applied to them over the period that has elapsed since the passage of the Act, subject only to local statutes of limitations, and double payment is exacted under the penal sections of the Act, it may be that the mine owners will be subject to losses of huge amounts. Indeed the decision might prove even more sweeping in its effect for it might invalidate the compromise provisions respecting pay for travel time and liquidated damages that form part of contracts between the mine owners and the union in a large part of the industry. If portal to portal pay is required under the Act as a matter of law, such settlements are not binding if the amount paid is less than the actual wages due under the Act; and the mine owners would become liable not only to make up the deficiency but to pay an equal amount in addition as liquidated damages. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572. See also, *Guess* v. *Montague*, 4 Cir., 140 F. 2d 500; *Fleming* v. *Warshawsky & Co.*, 7 Cir., 123 F. 2d 622; *Johnson* v. *Dierks Lumber & Coal Co.*, 8 Cir., 130 F. 2d 115; *Rigopoulon* v. *Kervan*, 2 Cir., 140 F. 2d 506; *Birbalas* v. *Cuneo Printing Industries, Inc.*, 7 Cir., 140 F. 2d 826.

These considerations give force to the conclusion that Congress could not have intended to compel mine owners to pay large increases in wages over and above those specified in prevailing agreements, and also to inflict upon the mine owners additional sums in the nature of a penalty by giving to the term "work week", as used in the statute, a significance contrary to that which by voluntary agreement and by long continued custom had prevailed in the industry.

TENNESSEE COAL, IRON & R. CO.

v.

MUSCODA LOCAL NO. 123 ET AL. (FLEMING, *Intervener*).

SLOSS-SHEFFIELD STEEL & IRON CO.

v.

SLOSS RED ORE LOCAL NO. 109 ET AL. (FLEMING (*Intervener*).

REPUBLIC STEEL CORPORATION

v.

RAIMUND LOCAL NO. 121 ET AL. (FLEMING, (*Intervener*).

Civil Actions Nos. 5232-5234.

District Court, N. D. Alabama, S. D.

Aug. 13, 1941.

Action by the Tennessee Coal, Iron & Railroad Company against Muscoda Local No. 123 and others, wherein Philip B. Fleming, administrator, etc., intervened, consolidated with actions by the Sloss-Sheffield Steel & Iron Company against Sloss Red Ore Local No. 109 and others, wherein Philip B. Fleming, administrator, etc., intervened, and by the Republic Steel Corporation against Raimund Local No. 121 and others, wherein Philip B. Fleming, administrator, etc., intervened, for declaratory judgments, wherein the defendants filed counterclaims against the plaintiffs.

Judgment in accordance with opinion.

MURPHREE, District Judge.

These cases, which were consolidated for trial, are actions for declaratory judgments. The plaintiffs are three corporations engaged, *inter alia*, in mining iron ore; they contend that the workweek of their underground ore mining employees does not include, within the meaning of Section 7 of the Fair Labor Standards Act of 1938, Title 29, U. S. C.

A., § 207, that portion of the time spent by those employees in being transported and in walking to and from their usual working places. The defendants are labor unions, labor union officials, and individuals, who are representative of the general class of underground ore mining employees of the several plaintiffs. The defendants contend that the workweek of these employees includes all of the periods between the times when the miner reports for duty as required at or near the collar of the mine and when he reaches the collar at the end of the shift, except any fixed lunch period during which the miner is relieved of all duties, and also includes the aggregate of time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out. Because many persons in the class of the defendants are making actual claims upon the several plaintiffs for overtime compensation, based on the contention made by defendants in these actions, a justiciable controversy is presented.

The Administrator of the Wage and Hour Division of the United States Department of Labor has been permitted to intervene in each action, and he has made herein substantially the same contentions as have the several defendants.

The question presented is one of construction and application of the Fair Labor Standards Act of 1938 (hereinafter referred to as the Act). The important portion of Section 7 of the Act is:

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

By the provisions of Section 3(g) of the Act, Title 29, U. S. C. A. § 203(g), "employ" is defined to include "to suffer or permit to work".

The plaintiffs, in order to prove their contended construction and application, adduced evidence of two kinds: (1) Evidence of an alleged custom or usage, with respect to the issues here presented, of a kind that the plaintiffs contend Congress must have adopted in Section 7; and (2) evidence of the activities of typical underground miners in the plaintiffs' ore mines, in order to prove that their traveling and walking time is not within the purview of the language of the Act.

The defendants' evidence has been to prove: (1) That no such custom as contended by the plaintiffs existed, and that if it did it may not be given the effect contended for by the plaintiffs, and (2) that the activities of the underground ore mine employees here in issue have in fact constituted part of their employment and workweek.

1. *Custom or Usage.*

The plaintiffs' evidence as to custom or usage consists chiefly of the terms and agreements under which the defendants and their class of employees have worked and been paid, both by plaintiffs and other employers in the same industry. The plaintiffs contend that the custom has always and universally been such as to exclude any payment for the time spent by underground iron ore mine employees in walking and being transported to and from their usual working places, and to include only payment for time actually spent by such employees at their particular stations underground. The plaintiffs contend that this custom was so well established and understood that Congress must have adopted it in its use of the terms "employ" and "workweek" in Section 7 of the Act.

The evidence has disclosed no such custom. During the greater part of iron ore mining history in this district payment of the producing crews has been on a tonnage basis, the time spent by them at any place or places having no bearing whatsoever on their wages. At other times and places, payment was on a task basis, without regard to hours worked at any point. But plaintiffs place their greatest reliance of proof of custom upon the arrangements and contracts with the defendant labor unions under which the underground ore miners have worked for plaintiffs during the past several years. A typical provision of these contracts is: "Eight hours work per day shall constitute a day's work and forty hours shall constitute a week's work. The eight hours per day means eight hours of work at the usual working place, exclusive of the lunch period." This provision carries little weight in establishment of a custom not to pay for travel time, since in practice no record of the time spent "at the usual working place" has been kept and it was the exception rather than the rule that a man worked precisely eight hours at such a place. The actual practice under those contracts was for the company to arrange a shift which was supposed to run, by way of example, from 6:45 A. M. to 3:15 P. M. at the usual stations of duty underground, with thirty minutes off for lunch. The men in the working stations closer to the underground man unloading stations would usually actually arrive at their working stations before 6:45 A. M. and start working earlier than 6:45 A. M., the men in the furthest working stations would frequently actually arrive later than 6:45 A. M. Quite generally most of the producing crews left their particular stations before 3:15 P. M. In all cases the men were credited with exactly eight hours work, except in very unusual cases, although the time spent "at the usual working place" fluctuated thirty to forty-five minutes per shift as between men. Under these circumstances, regardless of the phraseology of the contracts, the pay was on a shift basis, rather than an hourly basis, and since some of the

men did not spend a full eight hours at their particular stations, it cannot be categorically stated that they received no compensation for at least part of the time spent by them in travelling to and from their usual stations.

It cannot be said that any established usage existed in the method of pay that made it clearly understood, by those concerned with iron ore mining, that the time spent in being transported and walking to and from the usual working places was not work or time spent in the employ of the employer. No custom existed that would indicate that the phrases "employ" and "workweek", used in Section 7 of the Act, would be understood, in their application to underground iron ore mining, to exclude such time from their purport.

Even if the mode of payment of these men did clearly exclude such time as employment and workweek time, it could not provide a controlling construction of Section 7 of the Act. The evidence clearly establishes that the methods of payment of wages were dictated almost entirely by the employers. The employees worked on the best terms they could obtain and the fact that they could not obtain terms that would compensate them for time spent in travelling underground to and from their working stations does not indicate that they did not consider that time as working time. It cannot be said that the way in which the iron ore miners have received their pay establishes, with their free and uncoerced agreement, the proposition that the time in question is not work time. Prior to the enactment of the Fair Labor Standards Act of 1938, iron ore miners repeatedly made efforts to obtain full, or at least a larger partial, compensation for so-called travel time. The fact that they were unsuccessful does not determine that they were erroneous in their contention that such time was work time, nor does it determine that Congress, in using the phraseology of Section 7 of the Act, adopted the prevailing method of payment. Since the usual methods of payment were not arrived at by unhampered

consent of the workers, it would be no more reasonable to assume that Congress, in the Fair Labor Standards Act, adopted the employers' formula than to assume that Congress intended to remedy the practice so far as it may have denied compensation for actual work. That Congress has the authority to abrogate such a practice was made clear in *Holden* v. *Hardy,* 169 U. S. 366, 397, 18 S. Ct. 383, 390, 42 L. Ed. 780, where the court said: "The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority."

No matter how strong a custom existed as to payment of ore miners, if the activities here in issue actually constituted employment and work, it could not be contended that the custom prevailed to deny the defendants compensation for the time consumed thereby. An occupational custom or usage cannot operate to avoid the mandate of an Act of Congress. *United States* v. *Houston Belt & Terminal Ry. Co.*, 5 Cir., 1913, 205 F. 344; *Ramsauer* v. *United States,* 9 Cir., 1927, 21 F. 2d 907. See *Holden* v. *Hardy, supra.* Especially is this true in the case of the Fair Labor Standards Act, which is clearly remedial in character. *Fleming* v. *Carleton Screw Products Co.*, D. C. Minn. 1941, 37 F. Supp. 754. The Act was established for the avowed purpose of eliminating detrimental labor conditions (Section 2 of the Act, Title 29, U. S. C. A. §202) and it would be a

mockery of the beneficent purposes of the Act if the provisions prohibiting employment for over a specified number of hours for each workweek, except at an increased rate of compensation, were held to incorporate a custom to pay employees only for a part of the time worked by them. Assuming the time in question is actually working time, there can be no doubt that it must be considered as a part of the workweek within the terms of the Act, and the alleged custom could not avoid the remedial effects of the Act.

Evidence has been introduced of administrative applications of other and similar laws, limiting or specifying hours of labor, to other situations. Because the facts in those cases to which those administrative applications were made, were quite different from the facts of the present cases, little light on the proper construction and application of the Fair Labor Standards Act to these cases has been shed by this evidence.

In the last analysis, therefore, plaintiffs must stand or fall on the question whether the time in issue was employment and work, as a matter of simple fact.

2. *Activities Constituting Work.*

No serious conflict of evidence is apparent as to the liability of the plaintiffs for payment to their underground ore mining employees for the aggregate of time spent on the surface in obtaining and returning lamps, carbide and tools and in checking in and out. The plaintiffs' evidence with respect to this time has been that the employees in question only occasionally obtained and returned tools on the surface, and that obtaining and returning carbide and lamps and checking in and out only consumed short periods of time. Certainly the infrequency of activities or the speed with which they can be performed will not change their essential nature as work, and it seems an inescapable conclusion that the activities mentioned are obviously work. They are performed on the premises of the employer, in

the furtherance of the employer's business, with no benefit to the employee (except to aid him in the performance of work for the employer), under conditions created and controlled by the employer, and they involve responsibility to the employer and physical exertion, even though not burdensome, on the part of the employee. No characteristic of work is lacking. This time must be included in the workweek of the employees represented by the defendants.

The second element of time which plaintiffs seek to have adjudicated as not within the workweek is the time spent by the underground ore mining employees in being transported from the surface to points at varying distances below the surface and back again at the end of the shift. In the same category must be considered supplemental rides given the men on the way to and from their underground stations between underground points. The plaintiffs ask for a declaration from this court determining whether this transportation time is within the workweek, without consideration of the actual conditions and manner in which the transportation has occurred. This court is not empowered to make such a declaration. Jurisdiction is delimited by the bounds of the actual controversy presented, and to attempt adjudications beyond those bounds could not be a proper judicial function. See: *Aetna Life Ins. Co.* v. *Haworth*, 1937, 300 U. S. 227, 240 *et seq.*, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000. The actual controversy concerns only the working time of the underground iron ore mining employees in the plaintiffs' iron ore mines, during the time between the effective date of the Act and the commencement of these actions, where and when certain conditions and activities existed and occurred. It is with reference to these conditions and activities, and not with reference to some hypothetical future circumstances, that we must deal with the questions here presented.

It is particularly important in these cases that the problem be approached in this factual manner, because transportation in the abstract might be construed to be a restful

and pleasurable activity for the passengers. In the underground ore mines of the plaintiffs and in the manner in which the underground ore mining employees have been transported, the reverse has been true. The cars in which the employees have been transported have not been designed for comfort, have frequently been merely ore cars bearing remnants of iron ore muck. The cars have been nearly always crowded to the extreme. The positions which the men have been required to assume during the transportation varies from a crouch with their bodies overlaying one another to a rigid propping of legs and arms against the sides of the car and the fellow passengers. These positions were assumed partially because of the press of human bodies in the cars and partially because of the necessity of keeping head and body in a deflected position in order to avoid injury from collision with low points in the roofs of the mine slopes or with projections from the roofs. These conditions have occasionally resulted in injuries of various kinds to the employees when the required degree of restraint and alertness has been relaxed. The trips were, or course, in the comparative darkness and enclosure of an artificially lighted mine. The air was humid and malodorous, the ventilation relatively poor and the heat increasing with the descent into the mine. These conditions are recited not for the purpose of censure of the plaintiffs' manner of maintenance of their mines, for these conditions may well be normal conditions in iron ore mines and practically inevitable. Nevertheless, the conditions are clearly conditions peculiar to the occupation of the men in the class represented by the defendants, conditions replete with hazards, conditions requiring physical exertion and mental alertness, and conditions unpleasant and burdensome to those encountering them.

The evidence has made clear that the transportation was had under the strict control and supervision of the plaintiffs. The plaintiffs prescribed the schedule of the trips, the speed of the trips, the loading of the men into the trips,

the rules of conduct during the trips, and in most cases required the men to ride the trip rather than walk. The plaintiffs contend that these were safety measures that would be applicable to any outsider coming into the mines. But the controls of the plaintiffs over the trips were clearly exercised in the interest of efficient operation of their mining business. Too, it is significant to note that infractions by employees of plaintiffs' controls over these trips caused such employees to be subjected to the discipline of the plaintiffs. Clearly, during the trips, up and down, the men were under the complete supervision of the plaintiffs. This conclusion is emphasized by the fact that frequently men were given their first instructions of the day prior to commencement of their trip down the slope, and it appears that they were always subject to such instructions on the surface regardless of the frequency with which explicit instructions were actually given. This fact further indicates that the employees on the trips down into the mines were engaged in and about the business of the plaintiffs.

We must conclude that the time spent in this type of transportation is worktime. It bears in a substantial degree every indicia of worktime: supervision by the employer, physical and mental exertion, activity necessary to be performed for the employers' benefit, and conditions peculiar to the occupation of mining. While time consumed in such transportation is not itself part of the time consumed in the actual production of ore, yet such time is a necessary and incidental part of the actual production of ore.

We do not mean to indicate that every detail of the conditions and activities referred to are requisite to constitute this travel time worktime, because these conditions have varied slightly from mine to mine and from time to time. But these details have generally prevailed, and even the minimization of the essential elements of work, which have here usually been present in some degree, does not change the conclusion that work has in fact been performed. See

Missouri, K. & T. Ry. Co. v. *United States*, 1913, 231 U. S. 112, 34 S. Ct. 26, 58 L. Ed. 144.

The final element of time in issue is the time spent in walking between the points underground at which the men were unloaded on the way in and loaded on the way out and the points at which the men were stationed, i. e. between the underground manloading station and the particular working places.

During these walks, the physical conditions encountered by the men were even more difficult than during the part of the descent spent in riding. The atmosphere becomes warmer and more humid, the ventilation even less effective and the air fetid. The roof is low in places, requiring the walkers to stoop. The footing is irregular, sometimes rough, sometimes wet and slippery, overhead wires (often not insulated or guarded) and pipes must be carefully avoided. The passageways are up and down grades of varying steepness. In short, a very substantial amount of physical and mental energy is required during this walking.

What has been said of the supervision by the employer of the time during which the men are transported up and down the main slope applies equally to the walking time of the men away from and back to the slope.

We find that the time consumed by the men in walking from the underground manloading station to their usual working places and back again at the end of the shifts, was part of their employment and was worktime.

We conclude that the fixed lunch periods of one-half hour during which the employees have been relieved of all duties are not part of their employment or of their workweek.

The conclusions here stated have been reached by examination of the facts existent in the plaintiffs' mines during the period in which the underground ore miners are claiming that they earned unpaid compensation for overtime work under the provisions of the Fair Labor Standards Act. It may be helpful, however, to observe that these conclusions

are the same as those announced in the summary of the so-called "modified portal to portal" opinion of the Administrator of the Wage and Hour Division of the United States Department of Labor on March 15, 1941, which summary is as follows:

"The workday in underground metal mining starts when the miner reports for duty as required at or near the collar of the mine, and ends when he reaches the collar at the end of the shift.

"The workday also includes the aggregate of the time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out.

"The workday does not include any fixed lunch period of one-half hour or more during which the miner is relieved of all duties, even though the lunch period is spent underground."

The defendants have filed counterclaims against the plaintiffs for themselves and others entitled to compensation for overtime worked, by virtue of the fact that the time and activity put in issue by plaintiffs' complaints constitutes employment and work. Since we have concluded that the defendants are correct in their general position, these counterclaims will be set down for separate trial and judgment at a convenient date. See Rule 42(b), Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c.

Findings of fact, conclusions of law and declaratory judgments, in conformity with this opinion, will be entered in each of these actions.

TENNESSEE COAL, IRON & RAILROAD CO.

v.

MUSCODA LOCAL NO. 123 ET AL.

SLOSS-SHEFFIELD STEEL & IRON CO.

v.

SLOSS RED ORE LOCAL NO. 109 ET AL.

REPUBLIC STEEL CORPORATION

v.

RAIMUND LOCAL NO. 121 ET AL.

No. 10278.

Circuit Court of Appeals, Fifth Circuit.

March 16, 1943.

Appeals from the District Court of the United States for the Northern District of Alabama; Thomas A. Murphree, Judge.

Action for declaratory judgment by Tennessee Coal, Iron & Railroad Company against Muscoda Local No. 123, etc., and others, consolidated with actions by Sloss-Sheffield Steel & Iron Company against Sloss Red Ore Local No. 109, etc., and others and by the Republic Steel Corporation against Raimund Local No. 121, etc., and others. From the judgment, 40 F. Supp. 4, plaintiffs appeal.

Judgment modified, and as modified affirmed and cause remanded with directions.

Before Sibley, Holmes, and McCord, Circuit Judges.

Holmes, Circuit Judge.

These appeals are from a judgment declaring that the working time of underground iron-ore mining employees, comprising the work-week of such employes under Section

7 of the Fair Labor Standards Act of 1938,[1] includes time spent by them on the surface in checking in and out, obtaining and returning tools, lamps, and carbide, and time spent underground from the time they are required to report at the portal of the mine until they emerge therefrom at the end of their shift, less the fixed lunch period during which the employees are relieved of all duties; and declaring further that, since such aggregate working time exceeded the maximum work-week provided by said Act, appellants violated the Act in not compensating the employees as therein provided.

Appellants, corporations principally engaged in mining iron ore, filed separate civil actions under the Declaratory Judgments Act,[2] which were consolidated for trial, and as to which a single judgment was entered without objection. The actual controversy underlying federal jurisdiction related only to the hours of employment during the time intervening between the effective date of the Act, October 24, 1938, and the dates the respective petitions were filed in April, 1941. Upon a pre-trial conference it was agreed that the primary issue was what constituted the working time that made up the work-week of the underground ore-mining employees within the meaning of Section 7 of the Fair Labor Standards Act.

Section 7 of the Act requires every employer to pay overtime wages to any employee that is engaged in commerce or in the production of goods for commerce for a work-week longer than 44 hours between October 24, 1938, and October 23, 1939, longer than 42 hours between October 24, 1939, and October 23, 1940, and longer than 40 hours thereafter. The Act defines the word "employ" to include "to suffer or permit to work." § 3. It is without dispute that, during the period involved in this suit, each employee represented by appellees was engaged in the production of goods for commerce, and that each appellant required its

[1] 29 U. S. C. A. § 207, 52 Stat. 1060, 135 F. 2d 21.

[2] 28 U. S. C. A. § 400.

underground employees to work 40 hours each week at their regular working places in the depths of the mine. Whether, in addition thereto, such employees were entitled under the Act to have included in the computation of their work-week the time consumed each week in travelling from the portal of the mine to their regular working places, and in returning therefrom to the portal at the end of the shift, plus the aggregate of the time consumed each week by such employees in checking in and out and obtaining and returning lamps, carbide, and tools on the surface, or whether they were entitled to have any part of such time included in the working time comprising the work-week, is the precise question for decision.

The Act was drafted for application on a national scale, and it does not undertake to define what is working time in any particular industry or class of industries. What constitutes working time is a question of fact depending upon the particular circumstances, and is a matter for the determination of the courts in controverted cases. In the great majority of instances no question of this nature will arise; but in doubtful cases such as this the issue must be determined in accordance with common sense and the general concept of work or employment; and, as in other cases, the appellate court is controlled by the rule that the finding of the trial court upon decisive questions of fact must be upheld unless it is clearly erroneous.

There is no real dispute as to the facts upon which the travel-time question turns, but different inferences as to the working time may fairly and reasonably be drawn from these facts. The parties on both sides of this controversy petitioned the court below to decide the controverted issues between them, i. e., to find the facts, declare the law, and enter a declaratory judgment accordingly. The jurisdiction of the court below and of this court having been rightfully invoked, we are compelled to decide the issue as to work-time without regard to what may be the result of an accounting between the parties. Courts

should not consider the consequences of their legal decisions, except in trying to ascertain the legislative intent in enacting a statute of doubtful meaning; and, whatever may be said as to inferences from the facts, the law of this case is not doubtful. Moreover, no one can say at this time what will be the result of an accounting to be had in the future. We must limit our decision to the issues presented.

At the beginning of the shift the underground employees were required to report at the portal of the mine at a specified time, there to deposit their identification check at the tally office and to board the conveyance provided by the company for transportation to a man-unloading station inside the mine. The men rode in skips or ore cars, which were usually coated with grime of the mine, and assumed a crouched position to minimize the hazard of hitting their skulls against the low tunnel ceiling. Upon reaching the underground station the men left the skip and walked the remaining distance to their respective working places. They were obliged to exercise caution at all times to avoid contact with uninsulated electric wires and other hazards, and carried several pounds of equipment to be used in their work during the day. The men frequently were given instructions as to when and how they should perform their respective duties before the skips left the portal of the mine, and at all times during the descent they were subject to company rules and under company control. The return to the portal at the end of the shift was accomplished in the same manner and under the same conditions.

After considering these and other facts of a similar nature, the court below found as a fact that all of the time thus consumed was work-time and should have been included in the computation of the employees' work-week.[3] Since this travel-time was spent on the employer's prem-

[3] *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123 et al.*, D. C., 40 F. Supp. 4.

ises and subject to its directions, since it exacted mental and physical exertion from the employees under conditions both hazardous and unhealthful, and since it was a course of action pursued solely as a necessary incident to the prosecution of the employer's business, we are unable to say that this finding of the court below was clearly erroneous.

Appellants contend that the industrial history and contractual course of dealing between the parties showed conclusively that travel-time in these iron-ore mines was not working time. It may be conceded, arguendo, that for twenty-five years prior to 1938 iron-ore miners had not been compensated for travel-time, and that even after 1938 the parties to this suit had entered into contracts whereby it was agreed that no wages should be paid for travel-time; but the very purpose of the Fair Labor Standards Act was to eliminate labor conditions detrimental to the general welfare of workers, and the remedial machinery set up to accomplish that purpose regulated hours of work and rates of pay. Industrial custom does not warrant the continuation of abuses that the Act was created to rectify; and no contractual agreement that compensation should not be paid for travel-time is valid if in conflict with the Act. The record discloses that this agreement was not a simple statement of admitted fact, but was a compromise adjustment of real differences reached by way of negotiation and concession, and that the workers, though vainly, insisted upon their right to be paid for travel-time.

With respect to time spent by employees checking in and out and procuring and returning tools, lamps, and carbide, the case stands differently. It appears that the workers were obliged to furnish their own tools, lamps, and carbide, and were free to exercise their own judgment as to when, where, and how they should procure their equipment. The company merely instructed them as to the equipment needed, and did not attempt further to regulate the matter. The checking system used by appellants required the employees only to deposit a metal disc at the

tally house when arriving for work, and to pick it up again at the end of the shift. In addition to the practical difficulties incident to the computation of isolated moments so elusive in character, we think these pursuits should not be computed as work-time, since they fall within the category of duties incident to qualifying the employee to perform his work rather than within the scope of his actual employment.

Applying Section 7 of the Act to the facts of this case, we hold that the time spent by underground mining employees of appellants, from the time they were required to report and did report for work at the portal of the mine until they returned to the portal of the mine at the end of the shift, less the regular lunch period when they were relieved of all duties, constituted working time comprising the work-week; that appellants have not compensated said employees for some of said working time; and that reference of the cause to a master for calculation of amounts due said employees was proper.

It is ordered that the judgment appealed from be, and the same hereby is, modified so as to conform to our holding as to work-time. As so modified, the judgment is affirmed; and the cause is remanded to the district court for further proceedings not inconsistent with this opinion.

Sibley, Circuit Judge (dissenting).

The judgment about to be entered, in my opinion, misconstrues and misapplies the Fair Labor Standards Act, and visits on the appellants most unjustly a heavy pecuniary penalty; and if followed in other cases and by other courts will cause great confusion in the iron and coal mining industries at a time when the country can least afford confusion.

The Act does not define "work time" or even "work". It may apply to each and every industry. What would be work in one industry may not be in another. It seems to me that a man is at work, for the purposes of the Act, when he is doing what he is hired to do. It may involve mental

or physical effort, or it may consist in simple presence. It all depends on the contract of hiring. The Act did not intend to upset and nullify the wage contracts of force in the various industries. It simply fixed minimum wages for work done under them, and maximum hours. Of course contracts yield to the Act on these points, but they still control as to the work to be done, and the way it is to be done, and as to the scale of pay if not less than the minimum fixed by the Act. These things are left to bargaining, and especially to collective bargaining under the principles of the National Labor Relations Act, 29 U. S. C. A. § 151 et sq.

No question is older in such bargaining than the question whether "travel time" is to be included in "work time". The worker has always thought he ought not to lose all of the time necessary to go to and from his place of work; the employer has thought he ought not to pay for time that produces no work results. The dispute has been resolved in various ways in employment contracts for pay estimated by the hour. Plumbers demand and get pay from the time they leave their place of business to go to a job until they return. Railroad trainmen get pay from the time they report for duty, no matter what delay may occur in the starting of the train. Railway trackmen also are paid from the hour of their assembly at the section point, though they may ride their motor car for miles before doing any track work. On the other hand carpenters, masons, and most artisans and laborers are paid for work only after they take up their tools on the job. As to coal and iron ore miners, traditionally they have been paid according to production, but their modern contracts have always included an express agreement as to their work time, and that agreement has excluded from work time the travel time in reaching the coal seam or ore bed, which were agreed to be the place of work. This is true of the collective bargains made by strong unions throughout the Appalachian region, as it is true of the bargains under which the miners in this case

have worked.[1] Their work time is agreed to be that spent at the ore bed. The employers' arrangement to get them to that place reliably and safely is primarily for the benefit of the miner and is not work for the employer, according to these agreements. The discomforts and dangers of the trip, as well as the loss of time, are all considered in fixing the rate of pay for the work of extracting the ore, and the pay scales here involved are far above the minimum fixed by the Act. The miner's work is hard and dangerous, but his pay is supposed to compensate for all this. If it would be better to include travel time in work time, it ought to be done by a new bargain in which rates of pay are also reviewed. If the change is to be by a special statute (some western States have such statutes), it will operate justly in futuro, and not by unexpected penalty, as here.

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[1] On Sept. 18, 1933, the President approved a code for the Bituminous Coal Industry under the National Industrial Recovery Act 48 Stat. 195, which provided: "Seven hours of labor shall constitute a day's work and this means seven hours of work at the usual working places for all classes of labor exclusive of the lunch period, whether they be paid on the day, or the tonnage, or other piece work basis."

The Appalachian agreement, which was and is the basis of the Union contracts with the eastern coal mines contains the provision: "Seven hours of labor shall constitute a day's work. The seven hour day means seven hours work in the mines at the usual working places for all classes of labor, exclusive of the lunch period,, whether they be paid by the day or be paid on the tonnage basis."

Under these contracts "the usual working place" for miners has been universally understood to mean the face of the coal seam, and "travel time" to reach the seam is not "work time". The contracts and the practice have been of this sort since the eight hour day was established in 1898.

The contract between appellant Tennessee Coal and Iron Company and the union of its miners signed in October, 1938, Sec. 4, defined a day's work as eight hours, and a week's work as forty hours. "The eight hour day means eight hours of work in or about the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or paid on the tonnage basis." As in coal mining, the usual working place of the miner has always been the face of the ore bed. The other appellants had more or less formal contracts to the same effect. Travel time has never been paid or expected under any of them.

There is nothing in the Act to outlaw agreements that travel time in getting to or from the agreed place of work is not work time. This is true though the employer may organize a means of transportation and make rules for its use. The agreements here that work time includes only time at the face of the ore bed are not illegal. Digging out the ore is what the miners agree to do, and for that they are paid. Getting their tools together and riding or walking to the agreed place of work is not, by force of any law, work done for the mine owner. No one, I suppose, would say that if a group of miners who had spent an hour riding to work decided of their own will not to dig any ore and spent another hour riding back, they had done any work for which they should be paid by force of the Act.

Though these miners are paid according to their production of ore, they may not under the Act be employed, that is, "suffered or permitted to work", longer than the maximum hours per week without increased pay. These mines provide against that by fixing the hours at which they admit the miners and require them to leave, and especially by limiting the hours during which power is furnished for their drills. Section 7 of the Act has not been violated in this case unless the travel time is counted as work time, contrary to the contracts of employment and contrary to the expectations of those concerned for the past four years. Identical provisions in the employment contracts of the coal miners were decided by the Administrator to be good under the Act, and his conclusion was published, and thought applicable to the contracts here involved, until recently another position was taken as to iron mines.

It is now proposed to assess against these appellants as back pay for overtime an estimated quarter of a million dollars, to be doubled by way of penalty, to compensate the miners for their time in going to and from their place of work, in the face of their agreements that this time was not in their work time. They are to get three times as much per hour for riding and walking to and from the work they

were hired to do, as they get for doing the work itself. The injustice of it to me is shocking.

If the decision stands and is followed, chaotic conditions will ensue, and this is good ground to believe that Congress intended no such thing. If for travel time triple back pay is due by these mines, it is due by all the iron mines having similar wage agreements. Many will go broke, or have to cease operations, causing a loss of jobs to their men. The new mines are not deep, and travel time is negligible, but one of the mines here involved is old and extensive, and the travel time is about one and a half hours per day. This is nearly a quarter of the present work day of seven hours. If that time is to be unproductive, but as costly as the production time, this mine can hardly survive. The wage scales for each mine everywhere will have to be renegotiated to adjust business for the future to the new conditions, with the risk of discontents and strikes.

The decision will have to be applied also to the coal mines. Coal and iron ore occur in similar beds, and are mined in the same general way. In both, the old mines have the same difficulties. The collective agreements made by strong unions throughout the Appalachian country all contain the provision as to worktime we are now dealing with. When the Administrator first proposed to contend for what this court is about to do, it was the unions who objected most cogently, and successfully. The letter of the Legal Director of United Mine Workers of America[2] to

[2] Letter of Earl E. Houck to Philip B. Fleming, Administrator, dated July 9, 1940. That letter states, among other things: "Travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898. It is urged that any ruling requiring such a change in the custom, tradition, and contract provision so as to change the work day from 'seven hours' work in the mines at the usual working places to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos and would probably result in a complete stoppage of work at practically all of the coal mines in the United States."

the Administrator which appears in this record is a very strong argument against the invalidating of the agreements. That argument prevailed then. It ought to prevail now, for it applies as exactly to the iron ore workers as it did to the coal miners. The chaos predicted for the latter will come to both if the Act is so interpreted as to invalidate all these agreements.

TENNESSEE COAL, IRON & R. CO.

v.

MUSCODA LOCAL NO. 123, ETC., ET AL.

SLOSS-SHEFFILD STEEL & IRON CO.

v.

SLOSS RED ORE LOCAL NO. 109, ETC., ET AL.

REPUBLIC STEEL CORPORATION

v.

RAIMUND LOCAL NO. 121, ETC., ET AL.

No. 10278.

Circuit Court of Appeals, Fifth Circuit.

July 27, 1943.

Appeals from the District Court of the United States for the Northern District of Alabama; Thomas A. Murphree, Judge.

On petition for rehearing.

Petition denied.

For prior opinion, see 135 F. 2d 320, affirming, as modified, a decision of the District Court, 40 F. Supp. 4.

Before SIBLEY, HOLMES, and MCCORD, Circuit Judges.

HOLMES, Circuit Judge.

In the petition for a rehearing it is stated that the court's opinion in this case is far-reaching in its effect, extending to all iron-ore, limestone, and coal-mining employees in the United States, and "is of the greatest concern to millions of people and the general public". In the same petition it is argued that the facts upon which the court's conclusion was based "applied to only a few of the appellants' employees

and never applied to a great many employees". Passing over the inconsistency of these statements, it is only necessary to say that if the facts on which our opinion is based apply only to a few of appellants' employees, then the law as we have declared it affects only those few, because the law arises out of the facts: *Ex facto jus oritur.*

The parties agreed below that if the issue as to working time should be decided against appellants, the court should then determine whether or not the employees were entitled to recover and, if so, how much. In the absence of this agreement there was nothing to show that reference to a master for an accounting was necessary after the issue as to working time was finally adjudicated. A declaratory judgment is for the purpose of finally settling an actual controversy, and ordinarily should not be entered if it will not do so. We do not understand that appellants even now are objecting to the reference. They seem to think they have been cut off from presenting defenses to claims against them on the accounting; but in this they are in error except that the declaratory judgment herein as to what constitutes working time will be *res judicata* in any controversy that may arise between the same parties. In order to remove all doubt on this subject, it is ordered that our former opinion and judgment be amended by striking out the following: "that appellants have not compensated said employees for some of said working time."

The apparent confusion in which the appellants find themselves is doubtless caused by their failure to recall the nature of the actions that they themselves originally instituted. This appeal involves three separate civil actions that were consolidated for trial in the court below and disposed of by a single judgment. All of these suits were brought under the Federal Declaratory Judgments Act, which provides that in cases of actual controversy the courts of the United States shall have power to declare the rights and other legal relations of any interested party petitioning therefor, and that such declaration shall have the force and

effect of a final judgment or decree and be reviewable as such.[1]

This is a procedural statute that provides an additional remedy for use in cases of which the federal courts already have jurisdiction. It should be given a liberal construction and application.[2] A court may not arbitrarily refuse to exercise such jurisdiction in a proper case, but must decide the issue presented in accordance with the law and the evidence. The procedure is expressly provided for in number 57 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, and the technicalities of equity practice do not prevail therein. The courts are limited in their jurisdiction to cases of actual controversy of a justiciable nature, thus excluding an advisory decree.[3]

In the case before us both sides joined in the petition for a judicial declaration of the rights and legal relations of the parties, and no objection was made to a consolidation of the cases for trial or to the entry of a single judgment containing such declaration. On the contrary, at a pretrial hearing it was agreed by all of the parties that the primary issue in controversy was what constituted the working time that made up the workweek of employees within the meaning of Section 7 of the Act, 29 U. S. C. A. § 207. The contention of each side was stated, and it was agreed that, if the court decided the above issue against appellants, it would then determine whether appellees were entitled to recover and, if so, how much. The rights of all parties were reserved to present their respective claims and defenses upon an accounting. From these and other agreements in the record,[4] it appears that there is only one controverted issue before us at this time, which is what consti-

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[1] Judicial Code, Sec. 274d, as amended, 28 U. S. C. A. § 400; Rule 57 of Federal Rules of Civil Procedure.

[2] *Mississippi Power & Light Co. v. City of Jackson*, 5 Cir., 116 F. 2d 924, certiorari denied 312 U. S. 698, 61 S. Ct. 741, 85 L. Ed. 1133.

[3] *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 325, 56 S. Ct. 466, 473, 80 L. Ed. 688, 699.

[4] R. pp. 278-283.

tutes the working time of these underground ore-mining employees.

The objections to the majority opinion raised on the petition for rehearing may be subdivided, and stated under three heads, as follows:

(1) That the declaration is too narrow to cover all but a few of appellants' employees.

(2) That it is so restricted as to time as to include only the period extending from the date of the Act to the filing of suit.

(3) That this court erroneously declared the law as to when the working time of the employees began and ended.

As to the first objection, we have previously pointed out that the declaratory judgment is limited by the facts of the case. It is decisive of the exact controversy that appellants petitioned the court to determine and agreed was the primary issue to be decided. They asserted, and asked the court to say, that no part of the time spent by their underground employees in the bath house, or in going to and from the bath house, or to and from the portal, or to and from the man-loading station, or to and from their actual working places, constituted a part of the workweek under Section 7 of the Fair Labor Standards Act. We held, in substance, that no part of the time spent in going to and from the bath house, or in the bath house, or in going to and from the portal, was working time, but that the employment began at the time the employees were required to report and did report at the portal for departure underground, and ended upon their return thereto at the end of the shift, less the lunch period. If not required to report at any special time, as contended, then the compensatory employment should begin at the time of departure for the trip underground.

The second objection is that this court did not declare the rights and legal relations of the parties as they existed or may exist subsequent to the date suit was filed. There

are no facts in the record to support a finding covering this period, and no finding thereon was made by the district court; but we were told at the hearing, and it is stated in one of the briefs, that after the filing of these suits wages were paid upon a portal-to-portal basis. We cannot enter advisory judgments upon hypothetical facts. The declaratory judgments procedure does not change the essential requisites for the exercise of judicial power. The courts are limited in their juridiction to cases of actual controversy of a justiciable nature.[5] We have, therefore, decided the only actual controversy over which we have jurisdiction; and the plenary effect of the judgment as *res judicata* is ample protection for the future.

The third point stressed by appellants is that a mixed question of law and fact was submitted to the district court, in answer to which it incorrectly found the facts and erroneously declared the law. On appeal both contentions may be reduced to a single question of law, which is: Was the finding of fact of the court below as to working time clearly erroneous? In reviewing the decision of the trial court we are bound by Rule 52 of the Federal Rules of Civil Procedure, which provides that: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Even where there is no dispute about the facts, if different reasonable inferences may fairly be drawn from the evidence, an appellate court is forbidden to disturb the findings based on such inferences unless they are clearly erroneous. That this dispute turns upon questions of fact does not withdraw it from judicial cognizance in an action

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[5] *Nashville, C. & St. L. R.* v. *Wallace*, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730, 87 A. L. R. 1191; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 325, 56 S. Ct. 466, 473, 80 L. Ed. 688, 699; *Ætna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000; *Gully, Tax Collector*, v. *Interstate Nat. Gas. Co.*, 5 Cir., 82 F. 2d 145.

for a declaratory judgment. "The legal consequences flow from the facts and it is the province of the courts to ascertain and find the facts in order to determine the legal consequences. That is everyday practice."[6] The parties saw fit to submit the issues of fact to the court, without a jury, but this does not render indistinguishable the issues of law and fact. What constituted the workweek of these employees and how many hours they were suffered or permitted to work are questions of fact.

Upon reviewing the judgment as to the facts, an appellate court looks first to the findings of the court below, and then to the evidence in the record to ascertain whether or not those findings are clearly erroneous. The character of the controversy and the issue to be determined are the same as if this were merely an action by an employee for damages under Section 7 of the Act, viz: How many hours constituted his workweek or how long did his employer suffer or permit him to work? In its ultimate aspect this is a dispute over wages, only one element of which is in controversy: the working time, which is a factual quantity of wages just as the regular rate is a factual element of wages. These two factors multiplied together form the product that indicates the compensation.

The statute simply says that no one shall be employed for a workweek longer than the hours stated unless the employee receives compensation for the excess hours at a rate not less than one and one-half times the regular rate. That is all the pertinent law involved in this controversy. It is the only statutory provision necessary to be construed. It must be liberally construed.[7] The language is plain; it requires no outside aid in its interpretation; it contains simple words that are in common use; and, under

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[6] *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 242, 57 S. Ct. 461, 465, 81 L. Ed. 617, 108 A. L. R. 1000.

[7] *Bowie* v. *Gonzalez*, 1 Cir., 117 F. 2d 11; *Carleton Screw Products Co.* v. *Fleming*, 8 Cir., 126 F. 2d 537.

fundamental rules of construction, such words must be given their usual and ordinary meaning.[8] The statute itself defines the word employ to include and suffer or to permit to work. The legislative intent is clear, but it is expressed in general terms and does not extend to particular instances. The myriads of circumstances in which it would be necessary to determine working time in individual cases or classes of cases could not be covered with particularity by statute.

The record in this case presents no substantial question of law except whether or not the finding of the district court as to working time was clearly erroneous. This depends upon whether the inference, which was the basis of the finding, was a reasonable one. As modified by us, we think it was, because the ordinary man might fairly have drawn it from the evidence. It was a deduction that the average disinterested person might naturally have made from the facts. The deduction being warranted by the facts, it was not arbitrary and not clearly erroneous. This being true, the rule above quoted is that the finding "shall not be set aside".

These mines are located in Alabama. The contract of employment is being performed there, and the law of that state governs its performance subject to the overriding provision of the federal act that requires payment to employees of additional compensation for employment in excess of the hours specified. This controversy is over the amount of wages that should be paid; it turns upon the number of hours that the miners were employed within the meaning of the Act. There is no decision of an appellate court directly in point, though there is one from a federal district

[8] *Hamilton* v. *Rathbone*, 175 U. S. 414, 421, 20 S. Ct. 155, 44 L. Ed. 219; *Mackenzie* v. *Hare*, 239 U. S. 299, 308, 36 S. Ct. 106, 60 L. Ed. 297, Ann. Cas. 1916E, 645; *Caminetti* v. *United States*, 242 U. S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168; *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 759, 51 S. Ct. 297, 75 L. Ed. 672.

court in Idaho.[9] Workmen's compensation cases are not very helpful; they prove too much;[10] but one of them is of value not as a compensation case but as an authority to support our ruling that what is working time is a question of fact.[11] There is a decision under the Hours of Service Act[12] wherein the Supreme Court held that members of a train crew under orders, liable to be called at any moment and not at liberty to go away, were none the less on duty when inactive. The court said: "Their duty was to stand and wait."[13]

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[9] *Sunshine Mining Co.* v. *Carver, D. C.*, 41 F. Supp. 60, wherein the court held that time spent by miners in traveling from portal of mine to their usual place of work and back to portal should be included in hours worked, for which they were entitled to compensation under the Fair Labor Standards Act. See, also, *Sirmon* v. *Cron & Gracey Drilling Corp.*, D. C., 44 F. Supp. 29.

[10] In such cases the employee is generally protected while on or about the premises of his employer. In *Jett* v. *Turner*, 215 Ala. 352, 110 So. 702, at p. 704, the Supreme Court of Alabama said: "While the employee is being transported by the employer pursuant to the contract of employment, it cannot be questioned they have entered upon the day's work wherein mutual duties of employer and employee are presently being performed. The pay of the employee has begun, not in wages, but in service * * *."

See, also, *Overton* v. *Belcher*, 232 Ala. 396, 168 So. 442; *Moss* v. *Hamilton*, 234 Ala. 181, 174 So. 622.

Moss Tie Co. v. *Tanner*, 44 F. 2d 928, was a case, from the 5th Circuit under the Longshoremen and Harbor Workers' Compensation Act, 33 U. S. C. A. § 901 et seq., holding that an employee is generally in the course of employment while going to or from place of work by only practical route.

In *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, 48 S. Ct. 221, 222, 72 L. Ed. 507, 66 A. L. R. 1402, under the Workmen's Compensation Act of Utah, the United States Supreme Court said that the employment may begin in point of time before the work is entered upon and, probably as a general rule, may be said to begin "when the employee reaches the entrance to the employer's premises where the work is to be done."

[11] *Overton* v. *Belcher*, 232 Ala. 396, 168 So. 442.

[12] Act of March 4, 1907, c. 2939, 34 Stat. 1415, 45 U. S. C. A. § 61 et seq.

[13] *Missouri, K. & T. R. Co.* v. *United States*, 231 U. S. 112, 119, 34 S. Ct. 26, 27, 58 L. Ed. 144.

The law in dispute in the instant case covers less than a page,[14] but the facts are contained in seven volumes of a printed record of nearly five thousand pages. The federal act does not supersede the local law in the several states except to the extent of a conflict between them. It is for this reason that we attach importance to an Alabama decision distinguishing between a finding of fact and a conclusion of law.[15] In that case the court did not discuss the distinction, but what courts do is sometimes more important than what they say; and this is what the Alabama court did: Upon an issue as to the relation between the workman and the employer, it set aside the trial court's conclusion of law as inconsistent with its finding of fact. If the status of a workman when injured on the defendant's premises is a factual condition, the same is true as to the activities of miners. In the case cited we find the Supreme Court of Alabama drawing the distinction between questions of law and fact. The same distinction exists in federal law and proceedure, and there is nothing to the contrary in the Fair Labor Standards Act.

If the Alabama law governs, then why does not the agreement as to rates of pay and hours of employment prevail? The answer is this: It does except to the extent that the agreement conflicts with the paramount provisions of federal law. No agreement as to the hours worked or as to the time of employment is valid if the actual employment is longer than the time stipulated and is in excess of the hours specified in Section 7 of the Act. Whether one is working, resting, idling, playing, or preparing to work is as much a matter of fact as whether one is asleep or awake, or is laughing or crying. In *Skidmore* v. *Swift & Co.*, 136 F.

[14] No employer shall employ any of his employees for a workweek longer than 44, 42, or 40 hours, respectively, "unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." Sec. 7(a) of Act of June 25, 1938, c. 676, 52 Stat. 1063, 29 U. S. C. A. § 207.

[15] *Overton* v. *Belcher*, 232 Ala. 396, 168 So. 442.

2d 112, this court recently held, in an action for overtime compensation under 29 U. S. C. A. § 207, that the burden was on the employees to segregate the actual hours of their employment from the time spent by them in playing, sleeping, bathing, shaving, and dressing. So we say the Act does not define these instances; their peculiar character must be determined by evidence. Two people may be in swimming, an instructor and his pupil; one will be working and the other playing. The working time of every miner is a definite controlling fact that can and must be finally determined in order to fix the amount of wages due him under the federal statute. It is a fact that cannot be found in any statute or decision or law book (except statutes not applicable in this case), but must be determined by the court or jury in any justiciable controversy wherein a real issue arises with respect thereto.[16]

In a supplemental brief, one of the appellants says that the effect of our decision, the plain and definite holding of the majority, is that as a matter of law the time consumed in traveling from the portal of the mine to the face and in returning therefrom to the portal "must be included in the

[16] The court below found the following: The employees were required to report at the beginning of a shift in time to catch the vehicle on one of its trips underground. After reporting at the mouth of the mine the men were daily subject to instructions by the company, and frequently were given their first instructions of the day prior to entering the slope. They were forbidden to enter the mines until their brass checks had been deposited at the tally house. At this point vacancies in working crews were ordered filled by company officials; the head miner or crew foreman began to assemble his crew and to issue orders to its members. When the miners reported at the mouth they were in their working clothes and had their indispensable lamps. The loading of the men into the vehicle in which they were to be transported, as well as the speed and schedule of the vehicle, were under the control and supervision of appellants. They required the men to ride rather than to walk, and required certain ones to ride on particular trips. The miners, being under the disciplinary rules of the company and the supervision of its officials, were subject to conditions peculiar to their occupation from the time they entered the portal until their exit therefrom.

working time that makes up the workweek of every ore-mining employee within the meaning of Section 7 of the Fair Labor Standards Act". We did not so hold, and such should not be the effect of our decision.

We have written in vain if our opinion is to be interpreted as providing a rigid definition of working time, or as upholding the portal-to-portal theory as a matter of law, or as denying the principle that in close cases it is well to afford the fullest possible scope to agreements among the individuals who are actually affected. The evidentiary value of such agreements in relation to working time is for the jury or other fact-finding tribunal.[17] We have expounded no rigid definition of working time. The Act fails to provide one, and we should not do what was deemed unwise to do by legislation. The Congress probably failed to define working time for the same reason that it refrained from attempting to define the regular rate of pay, namely, "because the employment relationships to which the Act would apply were so various and unpredictable".[18]

Appellants sought by declaratory judgment to obtain a rigid definition of working time favorable to them. They now chide us for laying down such a definition against them. We did not do either; we merely refused, because not clearly erroneous, to set aside a finding supported by evidence as to what constituted working time of employees in the particular circumstances. The Act of Congress in this respect differs from the legislation of those mining states

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[17] Agreements as to working time or the rate of pay are not conclusive if the parties do not act in conformity to the agreements. The court below found that during approximately sixty years of iron-ore mining in the Birmingham district red-ore miners had been paid without regard to the number of hours spent daily at the face or at any specified place or station; and that there had never been any custom under which the miners were paid solely for time actually spent at their particular stations underground.

[18] *Walling* v. *A. H. Belo Corporation*, 316 U. S. 624, 634, 62 S. Ct. 1223, 1229, 86 L. Ed. 1716, 1723.

that limit work-time in underground mines to eight hours per day, and that include in this reckoning all time spent underground.[19]

The pertinent distinction between such state legislation and the Fair Labor Standards Act is that the state legislatures themselves drew the inference of fact as to the working time of miners and enacted a general law on the subject, whereas the Congress failed to provide a general rule or definition in any particular industry. As appellants themselves have pointed out, Section 7 is not limited in its application to any single industry, but is designed to provide a law as to overtime compensation for every sort of work to which the statute is applicable. A detailed code for each industry would have been utterly impracticable. Application to each particular situation of the uniform rule laid down by Congress was wisely left to the courts. Therefore, in actions under the Fair Labor Standards Act, the courts must decide justiciable controversies as to working time upon the law and the facts in accordance with the principles governing their jurisdiction and procedure. Unless the facts are undisputed and only one reasonable inference may fairly be drawn therefrom, what is working time is always a question of fact for the court or jury. In view of the diverse legislation above cited, and the general diversity of opinion on the subject, it cannot successfully be

[19] Arizona Laws of 1912, c. 28, Secs. 2 and 3, p. 59; Arizona Code Ann. (1939), Vol. 4, Secs. 56-115; Utah Laws of 1937, c. 59, amending Rev. Stat. (1933), Secs. 49—3—2. Cf. Nevada Comp. Laws (1929), Vol. 5, Sec. 10237. In the Wyoming statute an express disclaimer was inserted excepting "time consumed in going to and returning from work". Wyo. Rev. Stat. Ann. (1931), Secs. 63-103, 63-107. The Nevada statute limits underground work to eight hours, and provides that this shall "include the time employed, occupied, or consumed from the time of reaching the point of employment or place of work in any underground mine, and in returning to the surface from said point or place of work, and that it is the intent and purpose of this act that the period of time between arriving at the point or place of work, in any underground working, and returning to the surface from such point of work shall not exceed eight (8) hours within any twenty-four hours."

argued in this case that only one fair and reasonable inference may be drawn from the facts and circumstances in evidence.

Although from a state court decision,[20] the following is highly persuasive upon the point under discussion:

"The trior of an issue of fact, whether judge or jury, where the ultimate fact to be proven depends on the surrounding facts and circumstances of the transaction out of which the ultimate fact grew, must by process of reasoning and deduction find the ultimate fact. If, from the undisputed facts and circumstances, two reasonable inferences of fact may be drawn, which inferences are conflicting, and the trior of the issue of fact has found in favor of one as the more reasonable, such finding will not be set aside on appeal, unless against the overwhelming weight of the evidence.

"The chancellor in this case heard and saw the witnesses testify, and observed their demeanor on the witness stand. It could have been reasonably inferred from the undisputed evidence that the transfer of the bank deposit was intended as a gift absolute, and, on the other hand, it could have been reasonably inferred that it was a transfer in trust. The chancellor found that the latter was the more reasonable inference. The two inferences, of course, were conflicting. The chancellor settled the conflict. This court cannot substitute its judgment for his."

That the federal rule is practically the same, see *South Chicago Coal & Dock Co.* v. *Bassett*,[21] wherein the petitioners urged that whether the decedent was a member of the crew was a question of law, since the facts were undisputed; but the Supreme Court held it to be one of fact, and said that even if the evidence permitted conflicting inferences there was enough to sustain the Commissioner's ruling. In

[20] *Huckaby* v. *Jenkins*, 153 Miss. 359, 361, 121 So. 130, 131.

[21] 309 U. S. 251, 260, 60 S. Ct. 544, 84 L. Ed. 732, 738.

Commissioner v. *Horeshoe Lease Syndicate*,[22] a case from the Fifth Circuit, the court said that a finding of fact must be upheld "even though conflicting inferences fairly might be drawn by reasonable men from the undisputed facts."[23]

All of these decisions are persuasive of the correctness of our construction of that portion of Rule No. 52, previously quoted, which is that, in actions tried upon the facts without a jury, a finding of fact should not be set aside as clearly erroneous if from the undisputed facts and circumstances two reasonable inferences were fairly deducible and the trial court found in favor of one as being the correct inference. Any other construction of the rule would be equivalent to holding that a reasonable inference fairly drawn from undisputed facts was clearly erroneous, which would be reducing the matter to an absurdity. On the other hand, as will be pointed out in the next paragraph, very serious consequences with reference to state mining statutes might follow a final authoritative ruling that the only reasonable inference deducible is that travel-time is not work-time.

If the contention is sound that the court below should have entered a declaratory judgment for appellants, as prayed, but could not correctly enter one against them, as it did, because only one reasonable inference could fairly be drawn from the undisputed facts in evidence (which was that travel-time was not work-time), then the question instantly presents itself as to whether or not the Utah and Arizona statutes are merely arbitrary fiats, violative of the Fourteenth Amendment. The appellants would probably not press their argument to this extent, and yet if it were

[22] 110 F. 2d 748, 750.

[23] Cf. *Turner* v. *New York*, 168 U. S. 90, 95, 18 S. Ct. 38, 42 L. Ed. 392, wherein it was held that a mere inference of fact from the evidence was not reviewable by the Supreme Court on writ of error, that court being authorized to review only questions of law. This decision is authority for the proposition that such an inference as we are considering is a question of fact, and not a mixed question of law and fact as is being contended by appellants.

clearly error for the court below to make the inference it did as to working time, it would be difficult to conceive of facts in existence sufficient to uphold a state statute in which the same inference is not only implicit but must serve as the basis for an absolute rule of law that travel-time underground is work-time.

It being unnecessary for us to decide anything about the propriety of referring the case to a master for an accounting, since the parties have agreed that the court shall determine whether or not the employees are entitled to recover and, if so, how much,[24] the petition for a rehearing is denied.

SIBLEY, Circuit Judge, dissents as to the merits.

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[24] By their conduct and agreements the parties have waived questions of misjoinder of causes of action, misjoinder of parties, and the right of trial by jury. Rules 20, 21, 38, and 39 of Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c. A common question of law and fact in a multiplicity of suits is not of itself an independent ground of equitable jurisdiction, either in the courts of Alabama or in the federal courts. *Matthews* v. *Rodgers*, 284 U. S. 521, at page 530, 52 S. Ct. 217, at page 221, 76 L. Ed. 447, and authorities cited. See, also, *Tribette* v. *Illinois Cent. R. Co.*, 70 Miss. 182, 12 So. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, which the Supreme Court of Alabama followed in *Southern Steel Co.* v. *Hopkins*, 174 Ala. 465, 57 So. 11, 40 L. R. A., N. S., 464, Ann. Cas. 1914B, 692, wherein the Alabama court reconsidered its former opinion and adopted the rule announced in the Tribette case upon the question of the jurisdiction of equity to prevent a multiplicity of suits. For a history of the latter case, see *Cumberland Telephone & Telegraph Co.* v. *Williamson*, 101 Miss. 1, 57 So. 559, and Griffith's Chancery Practice, Sec. 439, p. 461.

Supreme Court of the United States.

No. 409.

OCTOBER TERM, 1943.

TENNESSEE COAL, IRON & RAILROAD COMPANY,

Petitioner,

v.

MUSCODA LOCAL NO. 123, ETC., ET AL.

SLOSS-SHEFFIELD STEEL & IRON COMPANY, *Petitioner,*

v.

SLOSS RED ORE LOCAL NO. 109, ETC., ET AL.

REPUBLIC STEEL CORPORATION, *Petitioner,*

v.

RAIMUND LOCAL NO. 121, ETC., ET AL.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

(March 27, 1944.)

Mr. Justice MURPHY delivered the opinion of the Court.

We are confronted here with the problem of determining in part what constitutes work or employment in underground iron ore mines within the meaning of the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. § 201. This question, which is one of first impression, arises out of conflicting claims based upon the actual activities pursued and upon prior custom and contract in the iron ore mines. Such an issue can be resolved only by discarding formalities and adopting a realistic attitude, recognizing that we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion.

Three iron ore mining companies, petitioners herein, filed declaratory judgment actions[1] to determine whether time spent by iron ore miners in traveling underground in mines to and from the "working face"[2] constitutes work or employment for which compensation must be paid under the Act. The respondent labor unions and their officials, representing petitioners' employees, were named as defendants and the Administrator of the Wage and Hour Division of the Department of Labor was allowed to intervene. The actual controversy relates only to the hours of employment during the period intervening between the effective date of the Act, October 24, 1938, and the dates when the respective actions were initiated in April, 1941.[3] It is conceded that if underground travel constitutes employment, the miners worked more than the statutory maximum workweek and are entitled to be paid one and one-half times the regular rate for the excess hours. But if the travel time is excluded from the workweek, thus limiting it to the time spent at the working face, no overtime payments are due.

After extended hearings, the District Court found that the travel time "bears in a substantial degree every indicia of worktime: supervision by the employer, physical and mental exertion, activity necessary to be performed for the

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[1] These actions were instituted under the Federal Declaratory Judgments Act, 48 Stat. 955, § 274D, 28 U. S. C. § 400. They were consolidated for trial purposes and the District Court entered a single judgment.

[2] The "working face" is the place in the mine where the miners actually drill and load ore. The "face to face" basis of compensation, advocated by petitioners, includes only the time spent at the working face. The "portal to portal" basis, proposed by respondents, includes time spent in traveling between the portal or entrance to the mine and the working face and back again, as well as the time spent at the working face.

[3] Since May 5, 1941, petitioners have paid their miners for travel time pursuant to contract in compliance with the opinion of the Administrator of the Wage and Hour Division that underground travel in iron ore mines is work within the meaning of the Act.

employers' benefit, and conditions peculiar to the occupation of mining." The court accordingly ruled that the travel time, as well as the time spent at the surface obtaining and returning tools, lamps and carbide and checking in and out, was included within the workweek. 40 F. Supp. 4. The Circuit Court of Appeals affirmed as to the travel time, holding that the District Court's findings on that matter were supported by substantial evidence. The judgment was modified by the Circuit Court, however, by excluding from the workweek the time spent in the activities at the surface. 135 F. 2d 320; rehearing denied, 137 F. 2d 176. The importance of the problem as to the travel time led us to grant certiorari.[4]

Specifically we are called upon to decide whether the District Court and the Circuit Court of Appeals properly found that iron ore miners were at work within the meaning of the Act while engaged in underground travel which they were obliged to perform on the property of and under the direction of petitioners as a necessary concomitant of their employment. The record shows that petitioners own and operate twelve underground iron ore mines in Jefferson County, Alabama,[5] and that the general pattern of facts underlying the findings of the courts below is essentially the same in each of these mines.[6]

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[4] No review has been sought of the exclusion from the workweek of the activities at the surface. We therefore do not discuss that issue in this case. *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 487, and cases cited.

[5] The Tennessee Coal, Iron & Railroad Company has eight mines; Sloss-Sheffield Steel & Iron Company, two mines; and Republic Steel Corporation, two mines.

[6] As the District Court pointed out, the conditions set forth by the record are not intended to be used to censure petitioners' manner of maintenance of their mines, "for these conditions may well be normal conditions in iron ore mines and practically inevitable." Moreover, the record indicates that the Spaulding mine of the Republic Company has been operated only intermittently and experimentally during the last 20 years and many of the conditions in the other mines are not present. The ore is close to the surface and miners can walk all the way to the working faces.

The miners begin their day by arriving on the company property at a scheduled hour[7] and going to the bath house, where they change into working clothes.[8] They then walk to the tally house near the mine entrance or portal; there they check in and hang up individual brass checks, furnished by petitioners, on a tally or check-in board. This enables the foreman and other officials to tell at a glance those individuals who have reported for work and those production and service crews that are incomplete and in need of substitutes. Vacancies are filled and the head miners and crews receive any necessary instructions. In addition, each miner either rents a battery lamp for the day or buys a can of carbide each day or two for underground illumination purposes. And at some of the mines, many miners stop at a tool box or tool house on the surface to pick up other small supplies and tools necessary for their work. These activities consume but a few mintes.

The miners thereupon are required to report at the loading platform at the mine portal and await their turn to ride down the inclined shafts of the mines. Originally the miners could reach the working faces entirely by foot, but as the shafts increased in length petitioners provided transportation down the main shafts. The miners accordingly ride part of the way to the working faces in ore skips[9] or

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[7] One of the Tennessee Company's superintendents stated that "Whenever a man comes to the mine late, dragging along and encourages others to be late, he is setting a bad example. I want this understood thoroughly—men must be on time; we don't care whether they work here or not, but if they want to work here they will have to be on time or else they will be disciplined, even to discharge."

[8] The use of the bath house, or change house, is optional. Some miners change their clothes at home and make no use of the bath houses furnished by petitioners.

[9] An ore skip is an ordinary four-wheeled ore box car made of steel. It is normally used for transporting ore and its floor is often covered with muck from such haulings. When men are riding in the car it is known as a "man skip trip." It is used for such purposes in the mines of the Tennessee Company and the Republic Company.

regular man trips,[10] which operate on narrow gauge tracks by means of cables or hoisting ropes. The operation of the skips and man trips is under the strict control and supervision of the petitioners at all times and they refuse to permit the miners to walk rather than ride. Regular schedules are fixed; loading and unloading are supervised; the speed of the trips is regulated; and the conduct of the miners during the rides is prescribed.

About three to six trips are made, depending on the size of the mine and the number of miners. Ten men sit on each man trip car, while from 30 to 40 are crowded into an ore skip. They are forced to jump several feet into the skip from the loading platform, which not infrequently causes injuries to ankles, feet and hands. The skips are usually overcrowded and the men stand tightly pressed together. The heads of most of them are a foot or more above the top of the skips. But since the skips usually clear the low mine ceilings by only a few inches, the miners are compelled to bend over. They thus ride in a close "spoon-fashion," with bodies contorted and heads drawn below the level of the skip top. Broken ribs, injured arms and legs, and bloody heads often result; even fatalities are not unknown.

The length of the rides in the dark, moist, malodorous shafts varies in the different mines from 3,000 feet to 12,000 feet. The miners then climb out of the skips and man trips at the underground man-loading platforms or "hoodlums" and continue their journeys on foot for distances up to two miles. These subterranean walks are filled with discomforts and hidden perils. The surroundings are dark and dank. The air is increasingly warm and humid, the ventilation poor. Odors of human sewage, re-

[10] A regular man trip is a specially constructed series of cars. Each car is about eight feet long and resembles a stairway. Five men sit on either side of the car facing outwards, back to back with five men on the other side. The man trip used in the Sloss Company mines consists of six such cars.

sulting from a complete absence of sanitary facilities, permeate the atmosphere. Rotting mine timbers add to the befouling of the air. Many of the passages are level, but others take the form of tunnels and steep grades. Water, muck and stray pieces of ore often make the footing uncertain. Low ceilings must be ducked and moving ore skips must be avoided. Overhead, a maze of water and air pipe lines, telephone wires, and exposed high voltage electric cables and wires present ever-dangerous obstacles, especially to those transporting tools. At all times the miners are subject to the hazards of falling rocks.

Moreover, most of the working equipment, except drills and heavy supplies, is kept near the "hoodlums." This equipment is carried each day by foot by the crews through these perilous paths from the "hoodlums" to the working faces. Included are such items as fifty-pound sacks of dynamite, dynamite caps, fuses, gallon cans of oil and servicemen's supplies. Actual drilling and loading of the ore begin on arrival at the working faces, interrupted only by a thirty minute lunch period spent at or near the faces. The service and maintenance men, of course, work wherever they are needed.

At the end of the day's duties at the working faces, the miners lay down their drills, pick up their other equipment and retrace their steps back to the "hoodlums." They wait there until an ore skip or man trip is available to transport them back to the portal. After arriving on the surface, they return their small tools and lamps, pick up their brass checks at the tally house, and proceed to bathe and change their clothes at the bath house. Finally they leave petitioner's property and return to their homes.

In determining whether this underground travel constitutes compensable work or employment within the meaning of the Fair Labor Standards Act, we are not guided by any precise statutory definition of work or employment. Section 7(a) merely provides that no one, who is engaged in commerce or in the production of goods for commerce, shall

be employed for a workweek longer than the prescribed hours unless compensation is paid for the excess hours at a rate not less than one and one-half times the regular rate. Section 3(g) defines the word "employ" to include "to suffer or permit to work," while Section 3(j) states that "production" includes "any process or occupation necessary to . . . production."

But these provisions, like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner. Accordingly we view Sections 7(a), 3(g) and 3(j) of the Act as necessarily indicative of a Congressional intention to guarantee either regular or overtime compensation for all actual work or employment. To hold that an employer may validly compensate his employees for only a fraction of the time consumed in actual labor would be inconsistent with the very purpose and structure of those sections of the Act. It is vital, of course, to determine first the extent of the actual workweek. Only after this is done can the minimum wage and maximum hour requirements of the Act be effectively applied. And, in the absence of a contrary legislative expression, we cannot assume that Congress here was referring to work or employment other than as those words are commonly used —as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.[11]

[11] Webster's New International Dictionary (2d ed., unabridged) defines work as follows: "1. To exert oneself physically or mentally for a purpose, esp., in common speech, to exert oneself thus in doing something undertaken chiefly for gain, for improvement in one's material, intellectual, or physical condition, or under com-

Viewing the facts of this case as found by both courts below in the light of the foregoing considerations, we are unwilling to conclude that the underground travel in petitioners' iron ore mines cannot be construed as work or employment within the meaning of the Act. The exacting and dangerous conditions in the mine shafts stand as mute, unanswerable proof that the journey from and to the portal involves continuous physical and mental exertion as well as hazards to life and limb. And this compulsory travel occurs entirely on petitioners' property and is at all times under their strict control and supervision.

Such travel, furthermore, is not primarily undertaken for the convenience of the miners and bears no relation whatever to their needs or to the distance between their homes and the mines.[12] Rather the travel time is spent for the benefit of petitioners and their iron ore mining operations. The extraction of ore from these mines by its very nature necessitates dangerous travel in petitioners' underground shafts in order to reach the working faces, where production actually occurs. Such hazardous travel is thus essential to petitioners' production. It matters not that such travel is, in a strict sense, a non-productive benefit. Nothing in the statute or in reason demands that every moment of an employee's time devoted to the service of his employer shall be directly productive. Section 3(j) of the Act expressly provides that it is sufficient if an employee is engaged in a process or occupation necessary to production. Hence employees engaged in such necessary but

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pulsion of any kind, as distinguished from something undertaken primarily for pleasure, sport, or immediate gratification, or as merely incidental to other activities (as a disagreeable walk involved in going to see a friend, or the packing of a trunk for a pleasure trip) . . ." The word "employ" is defined as follows: "2. To make use of the services of; to give employment to; to entrust with some duty or behest."

[12] Cf. *Dollar v. Caddo River Lumber Co.*, 43 F. Supp. 822; *Sirmon v. Cron & Gracey Drilling Corp.*, 44 F. Supp. 29; *Bulot v. Freeport Sulpher Co.*, 45 F. Supp. 380; *Walling v. Peavy-Wilson Lumber Co.*, 49 F. Supp. 846.

not directly productive activities as watching and guarding a building,[13] waiting for work,[14] and standing by on call[15] have been held to be engaged in work necessary to production and entitled to the benefits of the Act. Iron ore miners travelling underground are no less engaged in a "process or occupation" necessary to actual production. They do more than "stand and wait," *Missouri, K. & T. Ry. Co.* v. *United States*, 231 U. S. 112, 119. Cf. *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, 158. Theirs is a fossorial activity bearing all the indicia of hard labor.

The conclusion that underground travel in iron ore mines is work has also been reached by the Administrator of the Wage and Hour Division. On March 17, 1941, he approved an informal report of his representative based upon an investigation of the "hours worked" in underground metal mines in the United States. The report concluded, in part, that "The workday in underground metal mining starts when the miner reports for duty as required at or near the collar [portal] of the mine and ends when he reaches the collar at the end of the shift." See also *Sunshine Mining Co.* v. *Carver*, 41 F. Supp. 60. In addition, statutes of several important metal mining states provide that the eight-hour per day limitation upon work includes travel underground.[16]

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[13] *Walton* v. *Southern Package Corp.*, 320 U. S. 540; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517.

[14] *Fleming* v. *North Georgia Mfg. Co.*, 33 F. Supp. 1005; *Travis* v. *Ray*, 41 F. Supp. 6.

[15] *Walling* v. *Allied Messenger Service, Inc.*, 47 F. Supp. 773.

[16] Arizona and Utah statutes specifically include all the travel time within the eight-hour limitation. Ariz. Code Ann. (1939), vol. 4, sec. 56-115; Utah Code Ann. (1943), sec. 49-3-2. The Supreme Court of Montana has construed Mont. Constit., art. 18, sec. 4, and Mont. Rev. Code (1935), sec. 3071, which provide for eight hours of work per day in underground mines, to include all travel time, *Butte Miners' Union No. 1* v. *Anaconda Copper Mining Co.*, 112 Mont. 418, 118 P. 2d 148. Nevada Comp. Laws (1929), sec. 10237, provides that the limitation shall apply to travel one way. But Wyoming Rev. Stat. (1931), sec. 63-107, specifically excludes underground travel from the limitation; a like result has been

Petitioners, however, rely mainly upon the alleged "immemorial custom and agreements arrived at by the practice of collective bargaining" which are said to establish "the 'face to face' method as the standard and measure for computing working time in the iron ore industry." They further claim that since the Fair Labor Standards Act contains no specific provision regarding underground travel in mines, Congress must be presumed to have intended to perpetuate existing customs or to leave the matter to be worked out through the process of collective bargaining.

The short answer is that the District Court was unable to find from the evidence that any such "immemorial" custom or collective bargaining agreements existed. That court, in making its findings, properly directed its attention solely to the evidence concerning petitioners' iron ore mines and disregarded the customs and contracts in the coal mining industry. There was ample evidence that prior to the crucial date of the enactment of the statute, the provisions in petitioners' contracts with their employees relating to a forty hour work week "at the usual working place" bore no relation to the amount of time actually worked or the compensation received. Instead, working time and payment appear to have been related to the amount of iron ore mined each day. Hence such contract provisions defining the workweek are of little if any value in determining the workweek and compensation under a statute which requires that they be directly related to the actual work performed.

Likewise there was substantial, if not conclusive, evidence that prior to 1938 petitioners recognized no inde-

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reached by interpretation of California Stats. 1909, ch. 181, p. 279, in *Matter of Application of Martin*, 157 Cal. 59, 106 P. 238. Alabama and Tennessee fix no limitation on hours, while maximum hour statutes of other metal mining states are inconclusive insofar as the inclusion of travel time is concerned. See also Section 5(2) of the English Metalliferous Mines Regulation Act (1872), 35 & 36 Vict., c. 77, which provides that "The period of each employment shall be deemed to begin at the time of leaving the surface, and to end at the time of returning to the surface."

pendent labor unions and engaged in no bona fide collective bargaining with an eye toward reaching agreements on the workweek. Contracts with company-dominated unions and discriminatory actions toward the independent unions are poor substitutes for "contracts fairly arrived at through the process of collective bargaining." The wage payments and work on a tonnage basis, as well as the contract provisions as to the workweek, were all dictated by petitioners. The futile efforts by the miners to secure at least partial compensation for their travel time and their dissatisfaction with existing arrangements, moreover, negative the conclusion that there was any real custom as to the workweek and compensation therefor. A valid custom cannot be based on so turbulent and discordant a history; it requires something more than unilateral and arbitrary imposition of working conditions.[17] We thus cannot say that the District Court's findings as to custom and contract are so clearly erroneous as to compel us to disregard them.

But in any event it is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the workweek or not to compensate employees for certain portions of their work. The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him for only a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act.[18] Any custom or contract

[17] Blackstone has said that one of the requisites of a valid custom is that "it must have been peaceable, and acquiesced in; not subject to contention and dispute. For as customs owe their origin to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting." 1 Commentaries 77. See also Pollock, First Book of Jurisprudence, 283 (6th ed.).

[18] Congress was not unaware of the effect that collective bargaining contracts might have on overtime pay. It expressly decided to give effect to two kinds of collective agreements, as specified in Sec-

falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights. Cf. *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572; *Holden* v. *Hardy*, 169 U. S. 366. See also *Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467; *J. I. Case Company* v. *National Labor Relations Board*, No. 67, decided February 28, 1944; *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, No. 343, decided February 28, 1944.

This does not foreclose, of course, reasonable provisions of contract or custom governing the computation of work hours where precisely accurate computation is difficult or impossible. Nor are we concerned here with the effect that custom and contract may have in borderline cases where the other facts give rise to serious doubts as to whether certain activity or non-activity constitutes work or employment. It is sufficient in this case that the facts relating to underground travel in iron ore mines leave no uncertainty as to their character as work. The Act thus requires that appropriate compensation be paid for such work. Any other conclusion would deprive the iron ore miners of the just remuneration guaranteed them by the Act for contributing their time, liberty and strength primarily for the benefit of others.

The judgment of the court below is accordingly affirmed.

Mr. Justice FRANKFURTER, concurring.

The legal question on the record before us lies within a narrow compass. Section 7 of the Fair Labor Standards Act commands the payment of compensation at a rate of not less than one and one-half times the regular rate for every employee under the Statute who is engaged "for a workweek" longer than forty-four or forty-two hours

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tion 7(b)(1) and (2) of the Act. Cf. Section 8(c). It thus did not intend that other collective agreements should relieve employers from paying for overtime in excess of an actual workweek of 40 hours, regardless of the provisions of such contracts.

during the first or the second year, respectively, after the effective date of the Section and forty hours thereafter. 52 Stat. 1060, 1063, 29 U. S. C. § 207. Congress did not explicitly define "workweek" and there is nothing in the available materials pertinent to construction that warrants a finding that "workweek", as applied to the workers in the iron ore industry, had so settled a meaning at the time of the enactment of the Fair Labor Standards Act as to be deemed incorporated by reference. As a result, "workweek" in this Statute, as applied to workers in this industry and on this record, has no technical meaning, that is, a meaning so well known to those in this particular industry as to be applied by courts in enforcing the Statute when invoked by men in the industry. For purposes of this case, in any event, when Congress used the word "workweek", it used it colloquially—the term carries merely the meaning of common understanding.

An administrative agency for preliminary adjudication of issues arising under the Wages and Hours Law, like that established by the National Labor Relations Act, was not provided by Congress. And so, the application of this colloquial concept "workweek" to the multifarious situations in American industry was left by Congress for ascertainment by judicial proceedings. These facts are to be found either by a jury or, as in this case, by a judge sitting without a jury. And so here it was the judge's duty to determine what time and energy on the part of the employees involved in this suit constituted a "workweek" of these employees of the petitioners. After a trial which lasted for about three weeks, during which testimony covering 2,643 pages was heard and voluminous exhibits were introduced, the District Court made its findings of fact. A judgment for the employees based on these findings was affirmed by the Circuit Court of Appeals. 40 F. Supp. 4; 135 F. 2d 320.

We have then a judgment of two courts based on findings with ample evidence to warrant such findings. Affirmance by this Court is therefore demanded.

MR. JUSTICE JACKSON, concurring.

This case in my view probably does not present any question of law or, if so, it is one with a very obvious answer. When Congress in the Fair Labor Standards Act referred to "a work week longer than forty hours," it considered, I assume, that what was a work week in fact should be a work week in law. Therefore, the determination of any particular case does not govern any other, for each establishment and industry stands on its own conditions.

A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error. *Goodyear Tire & Rubber Co., Inc.* v. *General Dry Batteries, Inc.*, No. 262, October Term 1943, decided February 28, 1944; *District of Columbia* v. *Pace*, No. 117, October Term 1943, decided January 10, 1944; *Baker* v. *Schofield*, 243 U. S. 114, 118; *Williams Manufacturing Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364, 367.

In these cases ore mining companies sought declaratory judgments that miners' travel time in the shafts getting to and from actual mining operations, and some other time, is not to be counted in the work week as defined for overtime purposes in the Fair Labor Standards Act. They alleged that the custom of their mines excluded it, but the trial court considered all the evidence and said, "The evidence has disclosed no such custom." The companies also contended that the activity during travel is not in the nature of work. After hearing a mass of conflicting testimony the trial court said of these activities, "They are performed on the premises of the employer, in the furtherance of the employer's business, with no benefits to the employee (except to aid him in the performance of work for the employer), under conditions created and controlled by the employer, and they involve responsibility to the employer and physical exertion, even though not burdensome, on the part of the employee. No characteristic of work is lacking." These were found to be the facts by the two courts below and, whatever

we might decide if we were a trial court hearing the evidence in the first instance, we cannot with our limited review hold them wrong on this record.

If these facts are accepted, the ruling that such travel time is part of the work week seems manifest. I would affirm on these controlling facts.

MR. JUSTICE ROBERTS.

The question for decision in this case should be approached not on the basis of any broad humanitarian prepossessions we may all entertain, not with a desire to construe legislation so as to accomplish what we deem worthy objects, but in the traditional and, if we are to have a government of laws, the essential attitude of ascertaining what Congress has enacted rather than what we wish it had enacted.

Much of what is said in the opinion, in my view, disregards this fundamental function of the judicial process and relies on considerations which have no place in the solution of the issue presented.

What did Congress mean when it said, in Sec. 7 (a) of the Fair Labor Standards Act, that "No employer shall . . . employ any of his employees . . . *for a workweek* longer than forty hours . . . unless such employee receives compensation" for overtime at a specified rate? No other issue is presented.

The materials for decision are those to which resort always has been had in ascertaining the meaning of a statute. They are the mischief to be remedied, the purpose of Congress in the light of the mischief, and the means adopted to promote that purpose. These are not obscure in this instance.

The committee reports upon the bill which became the Fair Labor Standards Act[1] make it clear that the sole pur-

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[1] H. R. 1452, 75th Cong., 1st Sess., H. R. 2182, 75th Cong., 3d Sess., S. R. 884, 75th Cong., 1st Sess.

pose was to increase employment, to require a fair day's pay for a fair day's work by raising the wages of the most poorly paid workers and reducing the hours of those most overworked, and thus correct inequalities in the cost of producing goods and prevent unfair competition in commerce. The reports disclose no other purpose. The Congressional findings and declaration of policy embodied in Sec. 2(a)[2] exhibit no intent to deal with any matter other than substandard conditions in industry stemming from wage and hour practices. The Act will be searched in vain for a mandate respecting any subject other than minimum wages and maximum hours of work. This court has construed it as dealing only with these subjects.[3]

In this setting, therefore, we are to determine what Congress meant by the term "workweek" when it prescribed the maximum number of hours of labor an employer might require to be rendered within any week at the standard wage. The Act does not define "workweek", for the evident reason that Congress believed it had a conventional meaning which all would understand and to which all could conform their practices. The term combines two words in common use. A week is any period of seven days. In accepted usage a man's work means that which he does for his employer as the consideration of the wage he receives. The term is often used in a more general sense as when one is asked what he is doing and replies "I am working for Jones". Of course he does not mean that Jones is paying him for each hour of every week of his life. Men are not commonly paid for the time they sleep, the time they eat, or the time they take to go to, and return from, their employer's premises. Thus, although the phrase "work" may refer to the calling pursued, or the identity of the employer, it is plainly not so used in this statute. Its collocation with the word "week" and with the injunction as to

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[2] 52 Stat. 1060.

[3] *United States* v. *Darby*, 312 U. S. 100, 115, 117, 122, 125.

minimum pay, maximum hours, and overtime for extra work, in any week, shows that what Congress meant by work was what I have above described,—the actual service rendered to the employer for which he pays wages in conformity to custom or agreement.

It is common knowledge that what constitutes work for which payment is to be made varies with customs and practices in different industries or businesses. Where the employe is required to report at his employer's place of business and go thence to the place where his employer's activities are pursued, it has been the custom in some cases to pay for the time spent in going from the employer's place of business to the place of work. In many industries some or all of the employes are required to report and to remain at a given place awaiting a call for emergency or other casual service and, according to understanding, they are paid for the hours during which they wait as well as those in which they actually put forth physical or mental effort. There can be little doubt that Congress expected the provisions of the Act to be fitted into the prevailing practices and understandings as to what constituted work in various industries.

The Act does not provide that the Administrator or the courts are to define a workweek in the case of each employer on such basis as they deem right, regardless of the custom of the industry or of existing agreements between employers and employees. Nor does the Act vest authority in Administrator or court to disregard and supersede existing understandings and practices as to what constitutes work or the workweek. There is nothing in the words of the statute or its history to suggest that Congress intended, without mentioning it, to confer on the Administrator or the courts so vast a power over the industry of the nation.

The question in this case then is: What was the workweek of iron miners when the Act was adopted? If the answer is plain, then, I submit, that existing workweek must control in the administration of the statute unless and

until employer and employés, by consensual arrangement, alter the current practice.

The record presents no dispute as to the facts. Some are matters of public notoriety susceptible of judicial notice; others are contained in offers of evidence which the District Court excluded as irrelevant; others are exposed in the proofs.

Conditions of labor in iron mines and in coal mines are similar. In both, as the workings become deeper, the men have farther to go to reach the places at which they labor. The time thus consumed by individual workmen varies in the same mine, and in different mines. The conditions in the channels of approach to the places of work are somewhat better in iron mines than in coal mines. The custom in coal mines is, therefore, persuasive, since some of the petitioners maintain coal and iron mines in close proximity, and since the practice in the two has been the same for many years.

In the public arbitration proceedings at Birmingham, Alabama, in 1903, the testimony showed that a miner's day was reckoned "from the time [he] gets to the face of the coal until he leaves the face of the coal," and that the eight hour day was so measured. That arbitration resulted in a wage agreement on the "face to face" basis; that is, on a wage fixed according to the time the miners worked at the face of the coal.

In 1917 a public board of arbitration, whose award was approved by the United States Fuel Administrator, found:

"An eight hour day means eight hours work at the usual working places of all classes of employees. This shall be exclusive of the time required in reaching such working places in the workings and departing from the same at night."

In 1920 the report and award of the Bituminous Coal Commission, which was made the basis of agreement between operators and union miners, employed the language just quoted.

In 1933 the Code of Fair Competition for the Bituminous Coal Industry, promulgated by the President under the National Industrial Recovery Act, provided:

"Seven hours of labor shall constitute a day's work and this means seven hours work at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid on the day or tonnage or other piece work basis."

In 1933 the Appalachian Agreement, approved by the President, provided:

"Eight hours of labor shall constitute a day's work. The eight hour day means eight hours' work in the mines at the usual working places for all classes of labor exclusive of the lunch period."

Prior to 1938, the petitioner Tennessee Coal, Iron & Railroad Company paid its miners either on a piece work basis or upon a shift basis, as did the petitioners Sloss-Sheffield, and Republic Steel. But the common understanding of men and management was that, at first, ten hours and, later, eight hours constituted a working day. This is shown by the proofs and there is no evidence to the contrary.

On numerous occasions the men working in these mines claimed, through their unions, that they ought to be paid for travel time consumed in the mines in going to or from the face where they worked. Their demands for pay for travel time are eloquent proof that they understood the basis on which their pay was reckoned and that it did not include travel time as working time. No agreement to pay for travel time was made and no practice to pay for it was adopted.

In 1934 Tennessee made an agreement with the Union representing its employes, which was renewed in 1935, and again in 1936. It is undisputed that all of these agreements excluded payment for travel time. On October 6, 1938, before the Fair Labor Standards Act was in effect, a collective

bargaining agreement was made between the International Union, affiliated with the CIO, and the Tennessee Company. In this agreement it was provided:

"Section 4—Hours of Work. Eight (8) hours shall constitute a day's work and forty (40) hours shall constitute a week's work. Time and one-half shall be paid for all overtime in excess of eight (8) hours in any one day or for all overtime in excess of forty (40) hours in any one week.

"The eight (8) hour day means eight hours of work in or about the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis."

This agreement remained in effect until May 5, 1941, when the provisions in question were abrogated pursuant to an opinion promulgated by the Wage and Hour Administrator as hereinafter described.

The circumstances are not materially different with respect to Sloss-Sheffield. That company has bargained with a union representing its miners since 1934. Several times the union made a demand for payment of travel time but this was not granted. A formal agreement containing the same definitions of workweek, and hours of work, as in the case of Tennessee, was executed in 1939 and renewed in 1940. The company continued to pay on the face to face basis until 1941.

Republic Steel has had no formal written agreement with its employes, but it has bargained with their union. As early as 1933 the union suggested that an arrangement be made whereby the men enter the mine on their own time and come out on company time, but the matter was not pressed. It came up again in 1934. After a strike, negotiations resulted in a return of the men to work on the face to face plan of payment. In 1935 the union proposed that the employes should enter on their own time and come out on company time, but in negotiations the matter was dropped. In 1936 the union wrote the company respecting

an agreement and, in its proposal, said: "The eight hour day means eight hours in or about the mines at the usual working places for all classes of work." In 1939 the union proposed an agreement containing a like provision. In that year the union preferred charges before the National Labor Relations Board but these did not involve the face to face basis of wage computation. The complaint was settled by stipulation. The company continued to pay for a day's work on the face to face basis until May 1, 1941.

The Fair Labor Standards Act became effective October 24, 1938. At that time coal and iron miners were being paid on the basis of their time spent at their working places in the mine. The miners fully understood this basis.

On July 9, 1940, the director of the legal department of the United Mine Workers of America, in a letter to the Administrator of the Act, requested that he accept the definition of working time contained in the Appalachian agreement, which the letter said embodied "the custom and traditions of the bituminous mining industry." That definition was the same as that quoted from the Tennessee agreement, *supra*. The letter further said, respecting the face to face method:

"This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years and is the result of collective bargaining in its complete sense."

and further said:

"As mines grow older, the working places move farther and farther away from the portal or opening of the mine, and as such conditions develop, it becomes necessary for provision to be made for transportation of the men over long distances to their working places."

and added that adjustment of wage rates to any new measurement

"would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States."

On the footing of that letter the Administrator issued a release stating that the face to face basis in the bituminous industry would not be unreasonable.

On March 23, 1941, the Administrator announced a modified portal to portal wage hour opinion in which he defined the work day in underground metal mining as starting when the miner reports at the collar of the mine, ends when he returns to the collar, and includes the time spent on the surface in obtaining and returning lamps, carbide, and tools and in checking in and out. Realizing that this was a complete change of opinion, the Administrator announced that he would not seek to compel payment of restitution from mine owners operating on a face to face basis but that he could not interfere with the right of employes or their representatives to sue for past overtime and penalties under § 16(b) of the Act. Thereupon the unions representing miners demanded payment of overtime for all travel time since the effective date of the Act, and invoked the penalties specified therein.

In order to avoid possible penalties, the petitioners complied with the Administrator's ruling and brought the present suit for a declaratory judgment to the effect that working time of underground employes comprised the hours of work in the usual working places in the mine and did not include the time consumed in travel thereto and therefrom.

At the trial much evidence was taken as to the practice existing in iron mines long prior to, and at the date of the adoption of, the Fair Labor Standards Act. This was given by miners, foremen, and employers, and represented not any single locality but the industry over the country. In fact, some of the testimony consisted of depositions taken by the respondents, but offered by the petitioners. It was all

to the effect that the working time of iron miners had always been calculated and paid for according to the time worked in the mine at the place assigned for the work and that travel time had never been included in the time for which payment was made.

The district judge entered twenty-nine findings of fact. The first four are formal. The fifth is to the effect that, in the history of mining in the Birmingham District, plaintiffs' employes have been paid without regard to the number of hours spent at the face of the ore or at any specified place or station in the mines, and adds: "This compensation has never been based upon any precise number of hours spent daily at the face of the seam or at any specified place or station in the mines." The finding would seem difficult to explain in view of the history heretofore outlined. The explanation is found in the fact that, although the men were paid for an eight hour day of work at the face, if blasts were about to be set off at the close of the day the men were sent away from the face some time before the blasting but were, nevertheless, paid as if they had remained at the face for the full eight hours. But this can be no reason for disregarding the practices and agreements of the parties.

Findings 6 to 12, inclusive, refer to various methods of payment practiced in the past and to the character of the work of miners and other underground workers. They evidently are intended to show that, while an eight hour day was in force, the wage was not calculated at an hourly rate. Of course, they do not contradict the fact that forty hours constituted the workweek nor the fact that it was understood that no wages were paid for time spent in travel in the mines.

Finding 13 is to the effect that the unions which made agreements with various petitioners had never been certified by the National Labor Relations Board as appropriate units for collective bargaining. The bearing of this finding is difficult to understand in view of the fact that the employers dealt with the unions representing their men and

two operated under formal collective bargaining agreements with nationally affiliated unions.

Finding 14 briefly mentions that the men had several times demanded pay for travel time.

Findings 15 to 27, inclusive, describe the conditions under which the men arrive at the mine, check in, obtain their tools, and walk, or are carried, to their work underground and how they return. They recite that the men have to obey company regulations while they are on the company property and in going to and returning from work. Many of these regulations are for the men's safety. These findings also show that, after arriving on company property, the men receive certain directions with respect to the work they are to do. The obvious bearing of these findings is that the court thought travel ought to be considered work within the intendment of the Act, whatever the custom, practice, or agreement of the parties. It would be no less a judicial fiat, though somewhat more extreme, to hold that as the men's living quarters are uncomfortable and unhealthy and they must live in the neighborhood of the mines, the time spent in their homes must be paid for as work.

The two concluding findings are of facts which add nothing. They are to the effect that, if all the travel time is counted in the workweek, the men have worked more than forty hours per week and the petitioners have not paid them for more than forty hours.

The opinion and concurring opinion in this court rely heavily on these findings, especially as they were accepted by the Circuit Court of Appeals. But it will be observed that the findings are noteworthy for the feature that they deal, except in the instance mentioned, which has already been explained, with facts which are immaterial to the issues in the case. I do not see how aid to decision can be derived by refusing to disturb findings which do not meet the issue made by the pleadings. It is significant that the District Court avoided any finding as to whether the em-

ployers had ever paid travel time or as to the understanding of the parties that the employers were not paying for such travel time. And it is even more significant that the court made no finding whatever about the formal collective bargaining agreements entered into by the respondents with the petitioners in which both parties clearly signified their understanding of what was work in iron mines. And the court could not, under the proofs in this case, have found that these collective bargaining agreements were contrary to the accepted practice in iron and coal mines throughout the country prior to 1941. The petitioners objected that the findings omitted any reference to the fact that the companies had never paid for travel time, to the fact that the day's work for which wages were paid did not include travel time to or from the place where they mined the ore, or to the negotiations and agreements as to working time, and sought a new trial. The objections and motions were overruled.

Reliance is placed on the trial court's finding that the evidence discloses no custom to exclude travel time from the workweek. But that very reliance exposes the fallacy of the lower court's and this court's position. Unless the statute gave the courts authority to make contracts for the parties, which the statute did not make, a court could not support such a contract by finding that there was no custom with respect to travel time. It would be necessary for it to find that there was a custom to pay for such time, which the District Court failed to do, for the obvious reason that there was no evidence of such custom.

To say that we should pitch decision on acceptance of the findings of the trial court, when that court neglected to find facts which were highly relevant and material, is to disregard the real and the only issue in the case.

As I have already pointed out, the Fair Labor Standards Act was not intended by Congress to turn into work that which was not work or not so understood to be, at the time of its passage. It was not intended to permit courts to

designate as work some activity of an employee, which neither employer nor employee had ever regarded as work, merely because the court thought that such activity imposed such hardship on him or involved conditions so deleterious to his health or welfare that he ought to be compensated for them.

It is common knowledge that the issue of portal to portal pay was first nationally raised in connection with the mining industry after the nation was at war and in connection with disastrous coal strikes. And, indeed, the inspiration for the demand for portal to portal pay was furnished by the decision of the court below in this case. That decision was rendered on March 16, 1943. Three days later the National Policy Committee of the United Mine Workers changed its demanded definition of hours of labor so that existing demands, which, until then, had been on the traditional face to face basis of payment, should "conform with the basic legal requirements of the industry and the maximum hours of work time provisions be amended to establish 'portal to portal' for starting and quitting time for all underground workers." In presenting this demand it said: "The Mine Workers desire to take advantage of the law which, under the Alabama decision, grants them the right to be paid for the time they are in the mines." Thus it is plain that the decision under review was understood, as it must be, as a declaration of law by a court as to what is a workweek under the Act and not a finding of fact based on the custom of the industry and the agreement of the parties. In August class actions were filed by the United Mine Workers in various district courts to obtain overtime compensation for portal to portal pay.

One further fact should be noted. The District Court found that not only the travel time from and to the mouth of the mine should be counted as working time, but that the time men spent on the surface in collecting tools, etc. should also be included. The Circuit Court of Appeals, although professing to accept the fact findings of the Dis-

trict Court, reversed its judgment with respect to time spent on the surface, saying no more than that the District Court was wrong in including that time. This is further proof that the decision of the case by both courts below turns on the view of a court as to what ought to be considered work and what not, irrespective of the understanding of the parties. Suppose that the parties had agreed that travel time was working time and to be included and paid for in the workweek? Would the courts be at liberty to find the contrary and deprive respondents of the benefit of the agreement. I think not.

I cannot better characterize the result in this case than by quoting from what Judge Sibley said in his dissenting opinion below.[4]

"If it would be better to include travel time in work time, it ought to be done by a new bargain in which rates of pay are also reviewed. If the change is to be by a special statute (some western States have such statutes), it will operate justly in futuro, and not by unexpected penalty, as here.

"There is nothing in the Act to outlaw agreements that travel time in getting to or from the agreed place of work is not work time. This is true though the employer may organize a means of transportation and make rules for its use. The agreements here that work time includes only time at the face of the ore bed are not illegal. Digging out the ore is what the miners agree to do, and for that they are paid. Getting their tools together and riding or walking to the agreed place of work is not, by force of any law, work done for the mine owner. No one, I suppose, would say that if a group of miners who had spent an hour riding to work decided of their own will not to dig any ore and spent another hour riding back, they had done any work for which they should be paid by force of the Act.

. . . . . .

[4] 135 F. 2d 324, 325.

"It is now proposed to assess against these appellants as back pay for overtime an estimated quarter of a million dollars, to be doubled by way of penalty, to compensate the miners for their time in going to and from their place of work, in the face of their agreements that this time was not in their work time. They are to get three times as much per hour for riding and walking to and from the work they were hired to do, as they get for doing the work itself. The injustice of it to me is shocking."

I would reverse the judgment.

The CHIEF JUSTICE joins in this opinion.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 721

JEWELL RIDGE COAL CORPORATION, a Corporation, *Petitioner*,

v.

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, an Unincorporated Association, Affiliated with the International Union, United Mine Workers of America, et al., *Respondents*.

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 721

JEWELL RIDGE COAL CORPORATION, a Corporation, *Petitioner*,

v.

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, an Unincorporated Association, Affiliated with the International Union, United Mine Workers of America, et al., *Respondents*.

BRIEF FOR PETITIONER

On certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review the judgment of that court entered herein on the 6th day of October, 1944, (R. 899) by a divided court, reversing the judgment of the District Court of the United States for the Western District of Virginia entered herein on the 25th day of January, 1944 (R. 577-9).

I. THE DECISIONS BELOW

The opinions delivered in the courts below are as follows:

(1) In the District Court of the United States for the Western District of Virginia, *Jewell Ridge Coal Corpora-*

tion v. Local No. 6167, United Mine Workers of America, etc. et al., 53 F. Supp. 935.

(2) In the United States Circuit Court of Appeals for the Fourth Circuit, *Local No. 6167, United Mine Workers of America, etc. et al., v. Jewell Ridge Coal Corporation*, 145 F. 2d. 10.

These opinions are set out for ready reference in the appendix to the petition to this Court for a writ of certiorari at pages 43 and 80, respectively.

II. THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court, based on section 240 (a) of the Judicial Code, 28 U. S. C. A. 347, as amended by the Act of February 13, 1925, is invoked upon the following grounds:

(1) The case is of importance in the administration of the Fair Labor Standards Act of 1938, 52 Stat. 1060-9, 29 U. S. C. A. 201-219, inasmuch as the manner in which this statute is to be applied to a major national industry is directly in issue, and drastic effects both upon the economy of petitioner and of the industry in general and upon their future manner of operation are necessarily involved.

(2) The Circuit Court of Appeals has decided in this case an important question of federal law which has not been, but should be, settled by this Court.

(3) The Circuit Court of Appeals in this case has given improper effect to a decision of this Court, to-wit: *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123* etc. (March 27, 1944), ———U. S.———, 64 S.

Ct. 698, 88 L. ed. (adv. ops.) 610, by taking that decision, which was based upon the facts, conditions and history of the iron ore mining industry, as declaring the law for the bituminous coal mining industry as well, notwithstanding the distinguishing facts found by the Administrator of the Wage and Hour Division of the United States Department of Labor and by the District Court, and by the Circuit Court of Appeals itself.

III. STATEMENT OF THE CASE

For brevity, the Fair Labor Standards Act of 1938 will be herein called the Act; the Administrator of the Wage and Hour Division of the United States Department of Labor will be called the Administrator; the International Union, United Mine Workers of America, will be called the Union; and the case of *Tennessee Coal, Iron & Railroad Company v. Muscoda Local No. 123 etc., supra,* ———U. S.———, 64 S. Ct. 698, 88 L. ed. (adv. ops.) 610; 137 F. 2d. 176; 135 F. 2d. 320; 40 F. Supp. 4, will be called the Muscoda Case.

Italics are ours unless otherwise noted.

The opinions of the courts below in the case at bar, and the opinions of this Court and of the courts below in the Muscoda Case, are all set out in the appendix to the petition herein for a writ of certiorari, and for convenience we shall give the citations to that appendix as well as to the published volume.

(1) The Pleadings And Proceedings In This Case.

Petitioner filed its complaint (R. 3-17) on the 30th day of July, 1943, pursuant to the Federal Declaratory Judgment Act, section 274 (d) of the Judicial Code, 28 U. S. C. A. 400, as amended, against its underground workers as a class and the International Union, United Mine

Workers of America, their representative in collective bargaining, seeking judicial construction of the Act for the purpose of determining whether the word "workweek" as used in section 7 of the Act includes, by force of law, the time spent by the employees in traveling underground to and from their usual working places in petitioner's mines.

The respondents by joint answer filed September 8, 1943, (R. 18-27) asserted that petitioner's underground employees "are at work within the meaning and effect of the Act" from the time they "assemble" outside the portal of the mines at the beginning of the shift until they "disperse" there at the end of the shift, exclusive of the lunch period, and by counterclaim in behalf of themselves and all other employees similarly situated, respondents claimed, for the entire period subsequent to the effective date of the Act (October 24, 1938), the overtime compensation, one hundred per cent liquidated damages and attorney's fee provided by the Act. Before the trial began, respondents on November 6, 1943, filed an amendment to their counterclaim, disclaiming compensation and liquidated damages applicable to the period preceding April 1, 1943 (R. 28).

If the disclaimer is binding upon petitioner's employees, there is yet involved herein a sum estimated at $300,000.00, with a correspondingly large projection as to the industry as a whole. If the disclaimer is not binding and petitioner were held liable for back pay and overtime and statutory damages up to the limit of the Virginia 3-year statute of limitations, its resulting potential liability would amount to a great sum, estimated at approximately $1,000,000.00. If this sum with respect to petitioner, a comparatively small unit in a major national industry, is projected to the industry as a whole, the possibilities become ruinous on a great scale, as pointed out in the minority opinion of the

Circuit Court of Appeals herein, 145 F. 2d. 10, 15-16, app. pet. 92.

The case was heard by the District Court without a jury, which on January 25, 1944, entered judgment sustaining petitioner's contention that petitioner,

> "in computing the workweek of its underground employees on the basis of hours of work *in the mines at their usual working places* * * * *as provided in the effective wage agreements and continuations thereof*, and in paying its underground workers for their services on that basis, has complied with and discharged all its obligations imposed upon it by the Fair Labor Standards Act of 1938" (R. 578).

Respondents appealed to the Circuit Court of Appeals for the Fourth Circuit. Before the appeal was heard respondents filed their petition in this Court for a writ of certiorari. The petition was denied by order entered by this Court on May 29, 1944. The Circuit Court of Appeals then heard the case and by a divided court entered judgment on the 6th day of October, 1944, reversing the District Court (R. 899). Petitioner was granted certiorari by this Court on January 2, 1945.

(2) The Parties.

Petitioner is engaged in the business of operating two mines, employing about nine hundred men in all, in the bituminous coal mining industry, in the Counties of Tazewell and Buchanan, in southwest Virginia. Respondent International Union, United Mine Workers of America, and its respondent affiliates are the representatives of petitioner's employees in collective bargaining.

(3) The Question Presented For Decision.

Specifically, the question here, as indicated by the above quoted passage from the District Court's judgment, is

whether the contract definition of a day's work ("seven hours work in the mines at the usual working places for all classes of labor, exclusive of the lunch period"), which is contained in identical language in the successive basic wage agreements negotiated and executed between the Union and the industry, effective in the entire period here involved, is in conflict with section 7 of the Act and therefore invalid. Respondents concede that petitioner in paying its employees has at all times complied with the wage provisions of these respective agreements.

More generally stated, the question is whether *the Act requires* that the time spent by petitioner's employees in traveling underground to and from their usual working places in the mines be included within the "workweek" of such employees as the term is used in section 7 of the Act, and so paid for as worktime.

(4) The Respective Positions Of The Parties.

Petitioner here contends that the above quoted definition of a day's work contained in the above mentioned basic wage agreements is not in conflict with the Act, and that petitioner in discharging its contract obligations to its employees has likewise discharged its obligations to them under section 7 of the Act. The Union contends that the definition is in conflict with the Act by not including the underground travel time of the employees, and that petitioner consequently has not discharged its obligations to its employees under section 7 of the Act.

The familiar designations of the respective positions of the parties here are "face to face" as against "portal to portal." The basis for measuring the workday of the employees in this industry by the length of time spent by them "at their usual working places," in accordance with the contract definition, is the "face to face" basis. The

"portal to portal" basis measures the workday from the time of entering the mine opening ("portal") on the way to work until the time of emerging therefrom after completing the shift.

Petitioner thus contends that the Act did not operate to invalidate the "face to face" basis, while respondents contend that the "portal to portal" basis was made mandatory by the Act, and that the "face to face" basis thus became illegal by force of the Act. *Petitioner's position considers both "face to face" and "portal to portal" as allowable under the Act, and leaves the issue between them to be resolved from time to time by the elastic processes of collective bargaining. Respondent's position makes "portal to portal" rigid, exclusive and perpetual by force of law.*

(5) The Basic Wage Agreements.

The Act became effective October 24, 1938, while the Appalachian basic wage agreement, effective April 1, 1937, to March 31, 1939 (Ex. 8, R. 50), was in effect. It provided under the head of "maximum hours and working time" that a day's work "means seven hours work in the mines at the usual working places for all classes of labor, exclusive of the lunch period * * *" (Ex. 8, p. 3, R. 50). The next successive basic wage agreement, the Appalachian Agreement dated May 12, 1939, and effective until March 31, 1941 (Ex. 9, R. 51), defined the working day in identical terms (Ex. 9, p. 3, R. 51), as did the next which was the Southern Agreement, effective April 1, 1941, until March 31, 1943 (Ex. 10, pp. 2-3, R. 51). The last mentioned agreement remained in effect, or at any rate the industry continued to operate under it when operating at all, until the Ickes-Lewis Agreement of November 3, 1943 (Ex. 41, R. 310, 793-5). The last mentioned agreement provided a modified "portal to portal" basis of

measuring the workday instead of the "face to face" basis provided in the previous agreements, and the respondents are not here contending that petitioner is liable subsequent to the date of the Ickes - Lewis Agreement.

(6) The Act

Section 7 of the Act, so far as pertinent, is as follows:

> "(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and-half times the regular rate at which he is employed."

(7) The "Face to Face" Basis Has Long Been Firmly Established in the Industry as a Whole, Both by Custom and by Advocacy of the Union and by an Unbroken History of Bona Fide Collective Bargaining.

(a) The Coal Miner Has Always Been Deemed to be at Work When in his Usual Working Place and Not at Work When Going Thereto or Therefrom.

Workers in petitioner's mines and in the bituminous coal mining industry have definitely assigned working

places, termed in the basic wage agreements of the industry "the usual working places." From time immemorial and throughout the industry the measure of the working time of the employees has been the time spent by them at such working places. While going to and from such working places they have, *by invariable usage and common acceptation*, been deemed not to be "employed" or at work—"it *never* included travel time as a matter of pay or as a matter of work . . . *I never knew of any exception* in the bituminous coal mining industry . . . (R. 128). I never heard it referred to as work until now . . ." (R. 129).

As found by the District Court:

> " . . . . The evidence shows beyond question that, in the bituminous coal industry in this country, for the past fifty years, travel time of underground workers has not been considered work time" 53 F. Supp. 950, app. pet. 73.
>
> " . . . By the universal custom and usage for the past fifty years, and by agreement of the parties every collective bargaining agreement which was ever made, it was universally recognized that in the bituminous coal industry, travel time was not work time. And this is the condition which prevailed when the Fair Labor Standards Act was enacted in 1938, and of which it must be presumed Congress was aware . . ." 53 F. Supp. 950, app. pet. 74.

The "face to face" basis has been an unchanging part of the collective bargaining agreement of the industry:

> "The 'face to face' basis is traditional in the bituminous coal mining industry in this country, and has universally been the basis for the determination of hours of labor therein for approximately the past fifty years" 53 F. Supp. 939, app. pet. 50.

On this point the District Court quoted from the "Hoage Letter":

"This method of measuring the working time at the place of work has been the standard provision in the basic agreements for almost fifty years, and is the result of collective bargaining in its complete sense." 53 F. Supp. 940, app. pet. 51 (Ex. 19, R. 142, 669).

To the same effect was the finding of the Administrator:

"*Here is a large industry with about half a million employees in which the method of computing hours worked is virtually uniform throughout the industry and has been for many years.* Furthermore it is an industry in which this uniformity in agreement on hours worked has been achieved by national collective bargaining, and arrived at by the employers and the employees year after year in joint meetings which go back for half a century . . . *The determination of working hours has not been established in this way and with such uniformity in any other industry in the United States*" (R. 694).

(b) The Union has Always, Before Now, Been a Prime Exponent of, and Contender for, the "Face to Face" Basis.

The Union has long recorded itself consistently, definitely, strongly, in many different ways, under many different circumstances, directly and indirectly, in opposition to the interpretation for which it is here contending. It is extraordinary, indeed it would have seemed impossible, that the Union would now, in the gravity of a court proceeding, seek to reverse everything for which it has formerly stood, in favor of which it is so fully recorded. The sole reason for the Union's turnabout was to provide a means to a wage increase in 1943, after it had tried all other avenues of approach and found them closed by the national wage stabilization program (53 F. Supp. 941, app. pet. 54-5).

"Face to face" is not a usage which like Topsy "just growed", but, aside from caring for the actual working

time, it is tailored to the needs of the industry *under conditions of normal competitive operation.* It is supported by the essential and cogent considerations strongly expressed in the Houck Letter (Ex. 19, R. 142, 667-671, 53 F. Supp. 950-3, app. pet. 75-9), which the Union joined in composing and subscribing, and which will be hereinafter more particularly discussed. The Union's present position involves the contention that Congress intended to place a mandatory ban upon this carefully considered system and the wage structure it has so long supported.

(c) In Making the Basic Agreements, the Employees in the Industry have been Represented by a Powerful and Effective Union, and the Agreements so Produced Resulted from the Processes of Collective Bargaining in Which the Union Was a Free and Uncoerced Agent.

The record does not show just when the practice commenced of making the basic wage agreements *for the entire industry* by collective bargaining between the Union and the appropriate operators' bargaining association, but the continuous history evidently goes back at least to 1890 when the Union was organized (R. 325). The basic wage agreements thus negotiated have in more recent years run for a two-year term.

It is a matter of common knowledge that the biennial wage conferences, held usually in New York City and commencing some weeks prior to the expiration date of the then effective agreement, have long been occurrences of prominence and importance, not only to the industry itself but also to the country as a whole. They have customarily received large publicity in the public press and otherwise, and have been followed with rapt attention by the general public. They have not infrequently and indeed

generally been punctuated by deadlocks and by strikes which affected the entire economic life of the nation.

The Union, as the record shows, is the most powerful labor organization in the country (R. 176). With the unquestioning loyalty of its members and the consequent power of the "strike weapon" (R. 176), it can and does exercise, and long has exercised, a "force and compulsion" (R. 176) which the operators, and even the agencies of the government, have found no "comparable" means to combat (R. 320).

On this point the District Court found:

> "The record in this case by no means discloses 'a pitiable picture of helplessness against the domination of the mining companies'. On the contrary, the record here does disclose the picture of the 'strong and powerful' union mentioned by counsel (for respondents), which is able and willing, when it feels aggrieved, even in time of war, to paralyze the production of bituminous coal in this country by a strike. . . . It is hardly likely that such a union has been been coerced by the coal operators into waiving any valuable monetary right to which its members were entitled by law" 53 F. Supp. 948, app. pet. 70.

Hence the "face to face" basis was established not only by the custom of the industry, but also by the long succession of collective bargaining agreements *representing the uncoerced will of the Union* — "the result of collective bargaining in its complete sense" (Houck Letter, R. 669).

(d) The Documents Embodying the Results of the Collective Bargaining, Disclose a Total Absence of Contention on the Part of the Union that Underground Travel Time is Worktime, though the Circumstances which Produced these Documents were Such as Naturally to Have Evoked that Conten-

tion if the Union had Believed it to be True.

The period documented in the record commences in the year 1933, when petitioner's employees were organized (R. 42). But the prior documents containing the "face to face" provision go back, as already seen, "for almost fifty years".

(1) *The NRA Code of Fair Competion for the Bituminous Coal Industry.*—This document with its amendments (Ex. 1, 2 and 3, R. 42, 45, 46, 585-626) was drawn pursuant to the National Industrial Recovery Act, which was "the first general regulation of wage and hour standards for private employment". 53 F. Supp. 942, app. pet. 57. As found by the District Court, it was:

> "*drawn up for the industry by representatives of the Union and the Operators, and was approved by the President of the United States*", 53 F. Supp. 939, app. pet. 50.

The "face to face" basis of measuring working time was carried into the Code without opposition or question, either from the Union or anyone else (R. 132). John L. Lewis testified at the Code hearings (R. 131-2) and filed a lengthy brief (Ex. 18, R. 134, 632-666). This specifically recognized "face to face" ("the workday . . . refers to the time to be spent at the face of the coal vein, and does not include the entire period underground"—R. 656-7), and voiced no sort of objection thereto. Much of the brief was taken up by an argument for the six hour day, which was to be six hours of "actual work at the place of work" (R. 132).

Overtime work was absolutely prohibited by the Code—"No employee shall be employed in excess of seven hours per day and five days per week, *and this means seven hours work at the usual working places* for all classes of labor,

exclusive of the lunch period" (Ex. 3, Art. III, R. 611). This provision emphasized that travel *was not, and could not be, considered work or 'employment'* since the entire seven hours permitted was spent at the face.

There is a striking parallel between the use of the word "employ" in the Code and the Act, suggesting that the one was the prototype of the other and that the interpretation of the former should be applied to the latter for this industry.

A new basic wage agreement with the Union (Ex. 6, R. 48) was made as of April 1, 1934, carrying into effect the above-mentioned Code amendments, but without in any way changing the "face to face" basis of measuring the workday. This contract was to expire March 31, 1935, but was continued in effect by successive extension agreements until October, 1935, when a new two-year contract was made, dated October 1, 1935. NIRA was declared unconstitutional by this Court before the 1934 agreement expired so that it was the last made under the Code.

(ii) *The Agreement of October 1, 1935.*—This new contract (Ex. 7, R. 49), negotiated without the Code restraint, measured the workday, just as before, on the "face to face" basis. Thus, the parties, after the Code went out, continued, by collective bargaining agreement, to measure the workday on the "face to face" basis as before.

(iii) *The Appalachian Agreement of April 2, 1937.*—This new two-year agreement (Ex. 8, R. 50) also, like its predecessors, defined the workday by the same old formula: "seven hours work in the mines at the usual working places for all classes of labor". Like its predecessors, it governed all the other operations in the Appalachian area as well as those of petitioner.

(iv) *The Appalachian Agreement of May 12, 1939.*—

This two-year agreement, industry-wide (Ex. 9, R. 51), *was made when the Act was nearly a year old and had been in effect for more than six months. There was no contention in the negotiations which produced this agreement that the Act had made any change in, or required any departure from, the traditional basis* of measuring the workday at the "face" (R. 183). Both parties considered themselves as free as before the passage of the Act to contract in respect to the measure of the workday and workweek for the underground employees—an inescapable conclusion from the terms of this agreement. It provided, just as the preceding agreements had, for a seven-hour day meaning "seven hours' work in the mines at the usual working places".

(v) *The Houck Letter of July 9, 1940.*—No question was made by any one of the legality of the contract definition until the beginning of the year 1940, more than eighteen months after the passage of the Act. The issue was then raised, not *by the Union, but by the Administrator.* The testimony upon which the District Court's findings were based (53 F. Supp. 940-1, 945-6, app. pet. 50-4, 62-3) was wholly undenied, though we are sure that it will be conceded that Mr. Houck was present throughout the trial in the District Court.

At the beginning of the year 1940, Ashmede, an Examiner from the Pittsburgh Regional Office of the Division, appeared at the Revloc shaft of the Monroe Coal Mining Company in Cambria County, Pennsylvania, and began an investigation of that company's practice in relation to the Act. (R. 136, 183). In the course thereof, he raised the question whether underground travel time should be included in the workweek according to the rule written into the consent decree in the Cornucopia Gold Mining Company case (R. 136). After an extended in-

vestigation, Ashmede made to his superior, Calfee, about February 14, 1940, an exhaustive report in which he discussed the question at length and stated as his opinion that the "face to face" basis was proper to be applied in the coal mining industry (R. 136). But he indicated that if the Cornucopia rule was the proper one to apply, then the Monroe Company would owe its underground workers something in the neighborhood of $70,000.00 for the overtime accumulated from October 24, 1938, through February, 1940 (R. 137).

The Monroe Company was in the central Pennsylvania field, and the facts touching the investigation were brought to the attention of Charles O'Neill, president of the Central Pennsylvania Coal Producers Association, and a director of the Monroe Company. This was the first time he had ever heard of the question of travel time being raised under the Act (R. 135). O'Neill brought the matter to the attention of respondent John L. Lewis (then and now president of the Union), who appeared surprised that the question had arisen (R. 137). J. D. A. Morrow, president of Pittsburgh Coal Company, producing approximately a million tons of coal a month, was similarly surprised (R. 184), and certain operators, whom he communicated with, were so surprised and skeptical that they refused to take the matter seriously (R. 186).

O'Neill, and Cowan, Vice-President of the Monroe Company, discussed the matter with Gallagher, counsel to Dorsey, Regional Supervisor of the Philadelphia office of the Wage and Hour Division, and Gallagher wrote a report in which he confirmed Ashmede to the effect that the "face to face" method was proper (R. 137). Still the Wage and Hour Division did not close the Monroe case (R. 138). Accordingly O'Neill again conferred with Lewis, and was referred to Lee Pressman, C. I. O. general counsel. Pres-

suant to an engagement made by Pressman, O'Neill and Cowan called at the Washington office of the Wage and Hour Division and discussed the matter with two attorneys for the Division, who implied that the Monroe case would be closed (R. 138), but that was not done. In the latter part of June or first of July, 1940, Morrow, Cowan and O'Neill discussed the question in Lewis' office with Lewis, Bittner, vice-president of the Union, Houck, director of the Union's legal department, and Welly K. Hopkins, Esq., who had become the Union's general counsel. After full discussion, Lewis, who had to leave, made an appointment for the others with the Administrator in person (R. 139, 187).

O'Neill, Morrow, Cowan, Hopkins and Houck called upon the Administrator and discussed the matter with him at length. He indicated agreement with their views (R. 140, 188), and referred the group back to Gallagher, in the Philadelphia office (R. 140).

The other members of the Appalachian Joint Conference Negotiating Committee for the operators, viz: W. L. Robison, L. T. Putnam and L. C. Gunter, were notified, and they, together with Houck, O'Neill, Morrow and Cowan, conferred with Dorsey and Gallagher, at the Philadelphia office of the Division, about July 9, 1940. This conference considered the question thoroughly and at Gallagher's suggestion set about the preparation of a joint letter to the Administrator setting out the facts and practices in the industry which might serve as the basis of an administrative ruling (R. 141), as well as for decision of the Monroe case. *The result was the Houck Letter of July 9, 1940, which they composed, signed and sent to the Administrator* (Ex. 19, R. 142, 667-671). This letter was the act of the entire group (R. 142, 190), and accurately stated the facts and reflected the consensus, both of

the group who collaborated in its composition, and of the previous conferees on the subject including Mr. Lewis (R. 142, 190). The Union "took the same position on this matter throughout as the operators did" (R. 142, 190). It was "*the consensus*" *of these conferees that the contract definition of the working day "was consistent with the provisions of the Wage and Hour Act"* (R. 187).

The District Court found as follows with respect to the position taken by the Union while the Administrator had the present issue under consideration:

> "Both the Operators and the Union officials *were definitely opposed* to any construction of the Fair Labor Standards Act which would require payment for travel time" (53 F. Supp. 940, app. pet. 51).

The Houck Letter is *primary testimony on the precise question here in issue from the very men best qualified in the entire industry to testify as experts thereon. These are the men of all others who knew the answer to that question. These are the men of all others upon whose statement the courts are entitled to rely in deciding that question.* The letter will repay careful study.

Among the points quoted by the District Court from the letter are the following:

> "This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years, and is the result of collective bargaining in its complete sense" (53 F. Supp. 951-2, app. pet. 51).
>
> ". . . travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, *nor as hours worked by the employees*, and this has been the case since the eight-hour day was established in the industry—April 1, 1898" (53 F. Supp. 952, app. pet. 52).
>
> "Such a ruling, moreover, would establish such

diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated" (53 F. Supp. 952, app. pet. 52).

"This would be a most unhappy result to flow from an act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and the high rates of pay in the bituminous coal mines" (53 F. Supp. 952-3, app. pet. 52).

"For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, *and the definition of working time*, as set forth in the Appalachian Agreement (which embodies the custom and traditions of the bituminous mining industry) as complying both with the provisions of the Fair Labor Standards Act and of the Interpretative Bulletin No. 13, to the effect that 'reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act'" (53 F. Supp. 953, app. pet. 53).

Summarizing this letter, the District Court said:

" . . . not only is there no suggestion that by the terms of the Fair Labor Standards Act, travel time must be included in working time; on the contrary, it is positively asserted that any change from the traditional 'face to face' basis would 'result in complete chaos, and would probably result in a complete stoppage of work at practically all the coal mines in the United States'; and 'moreover', that 'the very purpose of the Fair Labor Standards Act would be defeated' by such a change" (53 F. Supp. 950, app. pet. 74-5).

It would be difficult to imagine any means by which

the Union could have become more definitely and completely recorded in opposition to its present position before this Court. *The facts show that the position then taken represented the mature, deliberate and unqualified conviction of the Union upon the exact present issue.*

(vi) *The Administrator's Ruling on the Issue.*—The Administrator communicated his ruling by letter addressed to Mr. Houck under date of July 18, 1940 (Ex. 20, R. 145, 672-3). He said:

> "*As you know, the determination of whether time spent in performing particular activities should be considered as hours worked depends upon the facts of the particular case. Accordingly, each activity must be scrutinized in relation to all the facts of the case.*
>
> . . . In view of the circumstances which you describe in your letter and in view of the special facts which were developed at conferences with representatives of the industry, it is our opinion that the practice of computing working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable."

The ruling was evidently made pursuant to paragraph 12 (quoted from in the Houck Letter—53 F. Supp. 953, app. pet. 79) of the Administrator's familiar Interpretative Bulletin 13 (Ex. 24, R. 178, 701), which contains the following provision:

> "No precise formula will solve this type of situation. What is unreasonably disproportionate depends upon the facts in the particular case and *reasonable standards agreed upon between the employer and employee will be accepted for purposes of the act.*"

A public release of the ruling was made on July 27, 1940 (Ex. 21, R. 147, 673), was publicly affirmed by the Administrator in his address delivered before the Ameri-

can Mining Congress September 18, 1940 (Ex. 22, R. 177, 685); and subsequently in his article published in the Engineering and Mining Journal, April, 1941 (Ex. 23, R. 177, 694). The ruling was definite and complete. The Monroe Mining case was closed, and as found by the District Court: ". . . it was thus administratively determined that the provisions of the Fair Labor Standards Act did not require the inclusion of travel time in the workweek of the underground employees in the bituminous coal mining industry" (53 F. Supp. 941, app. pet. 54).

The operators in Western Pennsylvania with whom the question had been raised accepted this ruling as a conclusive and final disposition of the issue, as did the industry generally (R. 191). The ruling was the consensus of all parties in interest—the Union, the Operators, the Administrator. There was no one left to object. *The industry relied upon the ruling and permitted a vast aggregate of potential "portal to portal" overtime claims to accumulate in the succeeding years.*

The time-table establishes that the Administrator's investigation and consideration of the question, before issuing his ruling, was deliberate and thorough. It extended from January, 1940, until July 18, 1940, when the ruling was made. Further consideration produced reaffirmance in September, 1940, and in April, 1941. It is noteworthy that *the latter reaffirmance was published subsequent to the converse ruling made by him upon the corresponding question in the iron ore mines,* which latter ruling was adopted by the District Court in the Muscoda Case (40 F. Supp. 10, app. pet. 104).

The Administrator has never departed from his bituminous coal ruling. He had intervened in the Muscoda Case and had participated actively in the proceedings as a

party, advocating the adoption of his iron ore ruling of March 15, 1941. He was invited to intervene in the case at bar (complaint, section IV, R. 14) and as noted by the District Court had counsel present throughout all the proceedings (53 F. Supp. 945, app. pet. 61). The District Court's inference was that the Administrator "did not wish to retract or modify his ruling . . . " (53 F. Supp. 945, app. pet. 61).

(vii) *The Southern Agreement of April 1, 1941.*— The 1941 wage conference was prolonged and was featured by the serious strike of 1941 and the split of the operators into two bargaining groups, Northern and Southern. The Southern Wage Agreement was finally produced under date of July 5, 1941 (Ex. 10, R. 51), which provided a 25% wage increase (R. 294). The same contract definition of the day's work was retained as before, and the Union at no time suggested that any change in the contract definition was made requisite by the Act or was even desirable (R. 148), *and this notwithstanding the intervening "portal to portal" ruling of the Administrator in the iron ore mines issued March 15, 1941* (40 F. Supp. 10, app. pet. 104).

(viii) *The Six-Day Week Agreement of February 10, 1943.*—This agreement, made between the Union and the Operators at the request of the Solid Fuels Administrator for the purpose of increasing the war-time national fuel supply, modified the 1941 agreement by providing for a sixth day of work of seven hours, to be paid for at time and a half (R. 135, Ex. 35, R. 303, 734). This provision was an amendment to the 1941 agreement, and *the additional day's work thus provided was measured by the same contract definition as before, without reference to travel time.* The accumulation of the potential travel time

liability was greatly accelerated by operations under the six-day week agreement (infra p. 76).

The 1941 agreement was the last basic wage agreement made under pre-war operating conditions. Later in 1943, came the 1943 Wage Conference, the failure of the negotiations, the strikes, the taking over of the mines by the government and the Lewis-Ickes Agreement of November 3, 1943, all of which will be discussed hereinafter (infra, pp. 38-48).

(8) The Facts of the Underground Travel in Plaintiff's Mines Negative the Proposition that the Travel Time is Work Time.

With the petitioner's mines, as with all other "drift" mines, the underground travel problem evolved and developed as the mine workings progressed (Houck Letter, 53 F. Supp. 952, app. pet. 77). At first, while the underground distances were short, no provision was made for transporting the men. All travel was on foot except when a man occasionally caught a ride in mule-drawn cars (R. 38). After 1915 electric power was used for hauling. The men continued to catch rides, and as the distance increased, the practice developed of waiting to take the men in. Out of this evolved the scheduled mantrip system now employed at these mines. Petitioner prefers for those men to ride the mantrips who have a considerable distance of underground travel and most of them do so, though this is not compulsory (R. 69).

The District Court found as a fact that travel in the mantrips is for the joint benefit of employer and employee (53 F. Supp. 939, app. pet. 48). It is obvious that both employer and employee derive an incidental benefit, since it is to the interest of each that man and work be placed in a position of effective proximity.

The District Court described the method of underground

operations and travel in his findings of fact (53 F. Supp. 937-9, app. pet. 45-9).

Mine workings are extended over a considerable area. Within that the men have regular places where they work. The only requirement of the men as to where and when they shall report for work is that they be at their working places at the beginning of the shift (R. 96, 97, 100, 113, 218). The District Court so found as a fact — "All plaintiff's employees *are required to be at their places of work*, for the morning shift, at 8 o'clock, A. M." (53 F. Supp. 938, app. pet. 46).

Most of the underground workers are coal loaders (R. 95). They have nothing to do before arriving at their working places (R. 97). *They are piece workers, paid an agreed rate per ton for loading coal*, which rate includes incidental duties such as timbering, handling slate and other things, varying to some extent in different mines (R. 41, 63, 106). In the early days these men ordinarily worked as contractors, supplying their own tools and equipment (R. 160), and were paid an agreed amount for a job. More recently, tools, explosives, etc., furnished by the miners, were covered in the contract rate per ton paid them (R. 163). It was not in response to any demand of the Union that the War Labor Board in 1943 required the operators to furnish tools for the coal loaders (R. 161). The loaders leave their tools at their working place (R. 97, 101). When one needs repair or other attention, he sees to that (R. 235). This does not happen more than four or five times a month (R. 368).

The "company men" comprise the other class of underground workers. Their province is to lay track, set "timbers", build "stoppings", and such (R. 97). They are paid by the hour (R. 97). Each of these has his usual working place on the particular day, where he is re-

quired to report for work (R. 99-100, 101-2). Before arriving there they do no work (R. 102).

About half of plaintiff's employees travel to work from the vicinity of their homes in vehicles operated by the company for the purpose at its own expense (R. 242-4, Ex. 28, R. 244-707). The vehicles used are trucks boarded up, with benches in them, so that they will hold from ten to eighteen men, and in addition buses and possibly other vehicles are used (R. 244). The highway distance traveled by the men in this manner ranges up to a maximum of seventy-two miles for the round trip, over mountain roads and in all kinds of weather (Ex. 28, R. 707). It is, of course, optional with the men to use this means of travel (R. 244).

At the mines the company provides and operates mantrips for continuing the transportation of the men to their working places. These mantrips are made up of mine cars drawn by electric locomotives ("motors") and usually have some five or six cars in a trip, but ranging up to fifteen or twenty cars when a haulage locomotive is used (R. 229). Whatever tools or other things the men may wish to take into the mines are put in the tool car (R. 226, 383), which is ordinarily the car next to the motor, and men by mining law are not permitted to ride in this car (R. 382). The cars are about twelve feet long and seven feet wide inside (R. 229). The bottom or lowest part of the car is two feet, six inches wide (R. 230). Alongside of that area, and rising above it, is a sort of bench (the "mourner's bench") two feet, three and three-fourths inches wide, and above that rises the outside wall of the car to a height of eleven inches (R. 230). The men riding in these cars ordinarily sit on the bench or, where the top is low, in the bottom of the car. Crowding in the cars is not permitted as found by the District Court (53 F. Supp.

939, app. pet. 48). Riding in them at the legal rate of speed is, as found by the District Court, "neither painful nor unduly uncomfortable, and is less hazardous than other phases of mining operations" (53 F. Supp. 939, app. pet. 49), i. e. than *work* in the mines. The conditions exhibit a striking contrast to those described in the Muscoda Case, as found as a fact by the District Court—"*I have found no such painful and burdensome conditions as those described in the iron ore mines*" (58 F. Supp. 949, app. pet. 71).

The mantrips are scheduled (R. 225), those going the greatest distance leaving first, and following so as to maintain an interval of at least five hundred feet. Their movement is governed by dispatchers, through the aid of a telephone system (R. 225). Each trip for purposes of safety, is under the supervision of a foreman (53 F. Supp. 939, app. pet. 49). His function is

> "right much like a conductor on a train. He directs the motorman and brakeman who are pulling that trip and supervises the safety of all who ride the trip" (R. 226).

The supervision of employees traveling on the mantrips, required by the mining laws, relates only to the safety of the transportation, and the men are subject to no features of direction for any other purpose—" . . . supervision is limited to the enforcement of safety rules and regulations" (53 F. Supp. 939, app. pet. 49). This is perfectly obvious upon inspection of the pertinent regulations, all of *which are prescribed by the public authorities, and not by plaintiff* (R. 382). The motormen are experienced and well trained in the handling of motors and mantrips (R. 228). The speed of the mantrips is kept as nearly as practicable at a maximum of six miles per hour (R. 164, 228). Nothing obnoxious is encountered on the travel ways (R. 438, 499).

The haulage ways over which the mantrips move are

more carefully inspected than any other portions of the mines and are much less hazardous (R. 509, 520). An accident on a mantrip is a rarity (R. 175, 264). This testimony is fully borne out by petitioner's experience. From January 1, 1939, a period of nearly five years, there were only six compensable accidents at both mines arising out of mantrip operation—*an average of 12,115 mantrip movements per compensable accident* (Ex. 45, R. 527, 807-9). As found by the District Court: "The injuries shown by the evidence to have been received by employees in plaintiff's mines on mantrips are surprisingly few in number and extent" (53 F. Supp. 939, app. pet. 49). On the record here shown, it is very doubtful that riding in plaintiff's mantrips is as dangerous as riding in an automobile on the highway.

In the mantrips, the men, both coal loaders and "company men", ride to the station nearest their working places. The length of travel from portal to working places in petitioner's mines varies from 4250 feet to 25,460 feet (Ex. 16, R. 115, 632). While carefully supervised for safety (R. 39F), men riding a mantrip are not asked to perform the slightest service. If a man on a mantrip is asked to do even so much as to throw a switch, his status changes and he is treated as being at work and paid from the instant of that service (R. 103). While it is true that on occasion a foreman, while on the mantrip, gives a man instructions about the day's work when he finds it convenient to do so, this is purely casual, as he similarly would give such instructions at any other convenient place or time (R. 267, 475). The giving of such directions on the mantrip is "rare" (53 F. Supp. 939, app. pet. 49). "Practically all the orders . . . . are given in the working place" (R. 267). As found by the District Court: "*No work or labor is required*

of employees while riding on mantrips" (53 F. Supp. 939, app. pet. 49).

Not all of the men ride a mantrip in; a total of seventy-two inside workers enter the mine at places other than the main portal, and proceed to their working places, either by walking the entire distance or riding a mantrip from the point of entry to the checking-in point (R. 116-123), which is on the man's particular "section" and at which there is a check-board where the man hangs one of his brass checks (R. 231). The men who walk in, use their own carbide lamps during the travel (R. 222). At the checking-in point they are furnished electric safety lamps which have been brought in for them on the mantrip by their foreman. It is significant that it is the foreman who gets these lamps from the lamp-house, carries them himself in a box to the tool-car of the mantrip, in which they are hauled to the section. He does not ask employees to handle this box or help with taking lamps to their fellow-workers, because "they are not yet at work" (R. 224). And in like manner, on the return trip in the evening, the foreman brings out these lamps.

The mantrips deliver the men to stations on the several sections. Near these stations are maintained the check-boards, and nearby is the section tool-box where the "company men" ordinarily have left their tools (R. 100). The men walk from there to their working places, which are in the immediate vicinity, some quite close and the most distant not exceeding approximately a quarter of a mile (R. 235).

At the end of the shift, the men are at liberty to go out of the mines as they please. The coal loaders who have "cleaned up" before the shift is over, frequently walk out without waiting for the mantrip (R. 239). More of the men walk out than in (R. 218). Those who desire to ride

out assemble at the station on the section and return by a mantrip conducted and operated in the same manner as the incoming trip (R. 227). Arrived at the outside, the men return the lamps to the lamp-house and go their several ways. Occasionally a man rides into the mine and for reasons of his own decides not to work. In such case he returns to the outside and is of course paid nothing for that shift (R. 240).

O'Neill said: "I don't think traveling is work" (R. 164). "It isn't work time as I have always known work time in that substantial number of years that I have been there" (R. 166). Those statements express a fair summary of the testimony under this head of the case, and the District Court so found as a fact.

(9) The Legislative History of the Act Negatives any Congressional Intent to Legislate a Change in the Contract Definition.

This branch of the facts in the case was carefully summarized by the District Court in his opinion (53 F. Supp. 942-4, app. pet. 56-61). The court said:

> "The bituminous coal industry is *sui generis*. Its problems have been before Congress for many years. It is one of the few industries, for the regulation of which special Acts of Congress have been passed such as the two Guffey Acts."

The court's conclusion is:

> ". . . . it seems to me clear that it was neither the intent of Congress nor the desire of the Union, in the enactment of the Fair Labor Standards Act of 1938, to interfere in any way with the wage structure of the bituminous coal industry" (53 F. Supp. 944, app. pet. 60-1).

(a) Congress, at the Time of Passing the Act, was Thoroughly Familiar with Conditions in the Bituminous Coal Industry.

The District Court referred to the conditions in the industry, "which prevailed when the Fair Labor Standards Act was enacted in 1938, *and of which it must be presumed Congress was aware*" (53 F. Supp. 950, app. pet. 74). This presumption is fully justified by the history, for when Congress entered upon the consideration of the Act, it had the conditions and the plight of this industry very freshly in mind. The Bituminous Coal Act of 1937 (50 Stat. 72, 15 USCA, sec. 828, ff.), approved April 26, 1937, had succeeded the Bituminous Coal Conservation Act of 1935. The Black-Connery bills, which became the Act, were introduced May 24, 1937, less than a month after the Bituminous Coal Act of 1937 was approved.

The coal legislation was made necessary by the fact that the industry had been operating at a deficit for a number of years. As found by the National War Labor Board,

> "The industry as a whole continued to report deficits through the year 1939. The year 1940 showed for the industry as a whole net profits for the first time in fourteen years" (Ex. 35, R. 303, 725).

The Coal Act was enacted for the purpose of stabilizing the economy of the industry by authorizing minimum prices for coal to be charged consumers, consisting of the weighted average cost of production (R. 203). It set up machinery for arriving at the amount of such prices (R. 202).

Pursuant to the provisions of the Coal Act, the Bituminous Coal Commission proceeded to hold hearings for the purpose of fixing these prices (R. 202). These hearings extended from July, 1938, to January, 1940 (R. 202), and so were in full swing at the effective date of the Act. They were very elaborate, the transcript containing some 40,000 pages of testimony and some 3,300 exhibits (R. 202). Hundreds of parties appeared (R. 203). The Union had its own representatives and in addition had two

members of the Commission itself, Major Percy Tetlow (who was a witness for respondents in the case at bar) and A. D. Lewis (R. 203). Tetlow was chairman and after the Commission was abolished he remained as technical adviser of the Bituminous Coal Division until the prices became effective in October, 1940 (R. 203).

Clearly if any party believed that the Act outlawed the "face to face" definition and made mandatory a change to the "portal to portal" basis, it was very much to the interest of such party to advance that contention in these hearings. If sustained, the necessary result would have been to include the consequent increased wages in the allowable operating costs and correspondingly to elevate the minimum prices to be charged the consumers of coal. Thus the consumers would have had to pay the increases so provided. The district boards were most anxious to overlook no allowable item of cost. They proposed every one they could think of—"we racked our brains" (R. 209). Yet throughout the course of the hearings and the further proceedings, neither the Union nor anyone else ever contended, or even suggested, that the Act required travel time to be paid for and that the expense thus entailed ought to be included in the minimum prices of coal (R. 204).

(b) The Legislative Consideration of the Act.

As found by the District Court:

> "In 1937 Fair Labor Standards Bills were introduced in both houses of Congress, and extensive hearings were held on these bills. Mr. John L. Lewis, President of the United Mine Workers of America, testified at length and at no time indicated that travel time should be included as work time. On the contrary, he indicated that he did not *expect* the bill to affect the coal

industry" (53 F. Supp. 943, app. pet. 57).

The court would have been wholly within the record if he had found further that Mr. Lewis had clearly indicated that he did not *desire* the bill to affect the coal industry, as shown by the quotations which the court made from Mr. Lewis' testimony (53 F. Supp. 943, app. pet. 57-8). Mr. Lewis said:

> ". . . . frankly I would not want this bill to convey power to a board to order an investigation into all of the wage agreements in the mining industry right now, or to give the board power to decide that collective bargaining agreements in the mining industry were not sound, not proper, were confiscatory, *or not in harmony with the facts of the industry and order a modification thereof.* I think the power of the board should be limited to cases which run *below the level of the standards fixed by Congress*" (53 F. Supp. 943, app. pet. 57-8).

Asked why the proposed board, if it should have "a right to investigate collective bargaining agreements below the wage level", should not have also the right to investigate collective bargaining agreements above the wage level, Mr. Lewis said:

> "Merely because their right of investigation of agreements *that were substandard* would be for the purpose of ascertaining whether that was so and of modifying them to meet the congressional standards" (53 F. Supp. 943, app. pet. 58).

In addition to the remarks quoted by the District Court, Mr. Lewis said:

> "If Congress fixes minimum wage standards of say 40 cents the only purpose of any investigation would be to determine whether or not that standard was enforced in the various industries, and *if obvious-*

ly it was enforced in the mining industry they would not need to investigate the mining industry. There would be no purpose in investigating the standard which was much higher than the minimum fixed by Congress." (Joint hearings before the Committee on Education and Labor, U. S. Senate, and the Commitee on Labor, House of Representatives, June 2-22, 1937, p. 297).

Mr. Lewis agreed to the correctness of the following summary of his testimony made by the Chairman of the Joint Committee:

> THE CHAIRMAN. As I understand your position, boiled down, with reference to the minimum wage—I want to be sure—it is that you favor a minimum-wage law written in such a way that it will preserve to the utmost the right of bargaining between employers and employees, but which will at the same time raise the low, substandard condition of millions of people, those who have been living in that sphere and have not as yet been able to elevate themselves either by their own bargaining or by collectively bargaining?
>
> MR. LEWIS. "That is correct, Senator" (Id. ib. p. 307).

The Congressional debates make it seem very plain that the purpose of Congress was precisely as summarized by the Chairman of the Joint Committee, namely, "to preserve to the utmost the right of bargaining between employers and employees but at the same time raise the low substandard condition of those who have not as yet been able to elevate themselves." This same sentiment was expressed in various ways too often during the debates to admit of any other conclusion. The following phrases are from the quotations made by the District Court (53 F. Supp. 943-4, app. pet. 58-60):

> "It is not intended that this law shall invade the

right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-work hour industrial workers who are the helpless victims of their own bargaining weakness that this bill seeks to assist to obtain a minimum wage." (Report of Senate Committee, July 6, 1937).

"(The bill) is concerned with those millions in industry who are unprotected and unorganized" (Mr. Randolph).

"(The bill) eliminates sweatshops" (Mr. Allen).

"I would have you observe that this proposed legislation will not improve the wages and hours of the majority of workers, nor does it attempt to." (Mr. Fitzgerald).

"It is merely aimed at wiping out sweatshop conditions and child-labor. Those are the two salient features and should be kept in mind." (Mr. Connery, Chairman of the House Committee—this statement was made shortly before the bill was passed).

"We are seeking, of course, only legislation to end starvation wages and intolerable hours; more desirable wages are and should continue to be the product of collective bargaining" (Message of the President, January 3, 1938).

Showing the vitality of the Union's approbation of this doctrine, even after the reversal of official Union position in late 1943, Major Percy Tetlow, member of the Union's negotiating committee and signatory of the 1941 agreement, testifying as a witness in the present case, said, as quoted by the District Court:

"No, the miners' organization has always taken the position that the question of wages, hours and conditions of employment should be governed and controlled by agreements under collective bargaining in the industry more so than by legislation. We have always

taken the position that any legislation which will improve standards of working men and women,—to favor it and foster it and support it. Fundamentally, we are opposed to legislation that controls the daily wage and conditions of employment. We think that is a relationship that should exist between employer and employee" (53 F. Supp. 944, app. pet. 61).

(c) The Wage and Hour Standards of the Appalachian Basic Wage Agreement, Produced by "Collective Bargaining in its Complete Sense", are not Substandard or Sweatshop Conditions.

As has been shown, it was the intention of Congress that the Act should not interfere with wage contracts which provided higher standards of wages and hours than those set by the Act. *Particularly and definitely there was no intention that the Act should interfere with the basic wage agreement of the bituminous coal industry.* No other reasonable inference can be drawn from the legislative history. It is proper for the Court to resort to the legislative debates and committee proceedings for light upon the congressional intent in particular cases (infra. pp. 77-79).

Mr. Lewis made it perfectly plain in his testimony before the Joint Committee that this industry was not to be considered "substandard" or "sweatshop." In this view he was obviously right, as can be readily established. The Act provides (sec. 6, 29 U. S. C. A. sec. 206) a minimum hourly wage of $.30 for the period here involved. The wages fixed by the basic wage agreements were far higher. It was said in the "Houck Letter":

> "Hours of work with wage rates constitute the heart of any such agreement. In this basic industry we have provided for seven-hour days, five-day weeks, thirty-five hours per week, with high rates of pay. The

basic inside day rate in the North is $.857 per hour, and in the South it is $.80 per hour" (53 F. Supp. 951, app. pet. 76).

Under the 1937 and 1939 agreements the minimum rate (paid cripples, boys and old men) was $.571 (Ex. 8, pp. 48-50; Ex. 9, pp. 50-52). Under the 1941 agreement the basic wage was increased 25% to $1.00, and the minimum rate (cripples, boys and old men) became $.735 (Ex. 10, pp. 66-9). As said by the National War Labor Board, June 18, 1943, (Ex. 38-A, R. 305, 759-760):

> "Since 1933 the mine workers' wages have been progressively increased until in March of this year, 1943, with the six day week and the great war time demand for bituminous coal, their weekly earnings are up to approximately $43.00 per week, which puts them up with the higher paid workers in the war industry".

It is stated in the release of the United States Department of Labor on Hours and Earnings dated December 23, 1944, that for October 1944, "The average work week in all manufacturing was 45.6 . . . Average weekly earnings amounted to $46.98 in all manufacturing. . ." "The average hours per week in bituminous coal mining was 44.1 . . . Bituminous coal miners earned an average of $52.33 a week. . . ."

With respect to hours of work, the higher standards of the basic wage agreements as compared with those of the Act are similarly striking. The Act provides, sec. 7, that time and one-half shall be paid for all hours exceeding a weekly aggregate of forty-four in the year beginning October 24, 1938, forty-two in the year beginning October 24, 1939, and forty in the year beginning October 24, 1940, and thereafter. The three successive basic wage agreements which were in effect in the period from October 24, 1938, to November 3, 1943 (date of Ickes-Lewis Agreement), each

provided that time and one-half be paid *for all hours worked in excess of seven hours per day and thirty-five hours per week.*

These comparisons obviously justify the statement of the Houck Letter that

> ". . . these substantive provisions of the agreement are among the highest standards of labor provided in any industry in the United States, both as to hours of working time and as to wages paid" (53 F. Supp. 951; app. pet. 76-7).

It is a fair summary that the documentary history of the Act and the statements in the legislative proceedings show that the Congressional intention was not to force upon this industry any departure from its established definition of worktime, and still less to interfere in any wise with the free play of the bona fide collective bargaining process with reference thereto. That process was recognized throughout as one of the efficient aids to the general designs of this legislation. Congress unquestionably knew (1) that this industry was hard-pressed economically, (2) that the Union had been highly successful in collective bargaining, (3) that in consequence the industry had standards of wages and hours far higher than those set up by the Act.

(10) The Evolution of the Union's Present Advocacy of the "Portal to Portal" Interpretation of the Act Shows that the Union's Position is Inconsistent and is an Afterthought.

(a) During the Five-Year Period Following the Enactment, the Union Never Contended that the Act Invalidated the Contract Definition of a Day's Work, though a Number of Opportunities Arose which would Naturally have Evoked that Contention, if the Union

had Believed it to be True.

In the five-year period after the enactment, the Union, if it had then believed what it now contends, must necessarily have availed itself of one or all of the following opportunities to advance the contention:

(i) The Hearings under the Bituminous Coal Act of 1937 (*supra*, pp. 30-31);

(ii) The 1939 Wage Conference and Agreement (*supra*, pp. 14-15);

(iii) The Administrator's consideration of the question and the Houck Letter of July 9, 1940 (*supra*, pp. 15-20).

(iv) The 1941 Wage Conference and Agreement (*supra*, p. 23).

(v) The Six-Day Week Agreement of February 10, 1943 (*supra*, p. 22).

(b) Throughout the 1943 Wage Conference the Union Sought a Flat Wage Increase for all Classes of Labor, both Outside and Underground, Applied on the "Face to Face" Basis, and Refrained from Seeking the "Portal to Portal" Basis.

The 1943 wage conference convened in New York March 12, 1943 (R. 288) and remained in session without agreement until the dispute was certified to the National War Labor Board on April 22, 1943 (Ex. 33, R. 302, 711). By agreement of the parties on request of the President (Ex. 29, R. 298, 708), the 1941 Agreement was extended to May 1st (Ex. 30, R. 299, 709). At the expiration of the extension the miners went on strike (R. 301), despite an order of the Board issued April 24, 1943, directing them to continue at work under the previous terms

and conditions (Ex. 32, R. 300, 710). The government on May 1st seized the mines (R. 301, 713) and the strike terminated May 6th (R. 713), the Union having agreed to extend the agreement to May 31 (R. 303). The Union abstained from appearing at the hearings before the Board on the wage dispute, which began May 10th (Ex. 33, R. 302,712), and also abstained from appearing before the fact finding panel appointed by the Board (R. 712). The Board on May 14th directed the wage conference to re-assemble and re-commence negotiations (R. 716), whereupon negotiations between the parties were resumed in Washington and continued until June 20th (R. 288-9). Meanwhile, at the end of the new extension of the 1941 agreement on May 31st, a second strike began (R. 303). On June 3rd the President of the United States requested the miners to return to work on June 7th (Ex. 37, R. 304, 738), which they did after receiving orders from the Union to return to work until June 20th (R. 304). On that date there was a third strike (R. 305) which was terminated June 23rd on appeal by the President, the Union at that time directing the miners to return to work for a period to end October 31st (R. 305).

On June 20th the 1943 Wage Conference dispersed, having found itself unable to reach an agreement, and "the matter of negotiation ceased" (R. 289). From that point the National War Labor Board was "in complete charge of the case" (R. 289). The mines were operated under the provisions of the 1941 basic wage agreement, until the Ickes-Lewis Agreement of November 3, 1943, was made (Ex. 41, R. 310, 793-5) which was approved by the War Labor Board November 5, 1943 (Ex. 41-A, R. 310, 795-6). During the entire period from May 1 to November 1 (except for a short period in the latter part of October) the Secretary of the Interior operated the mines (R. 309).

Throughout the 1943 Wage Conference from March 12th to June 20th the Union never at any time contended for a change from the "face to face" basis of measuring work... time—"there was a total absence of any suggestion that the method of pay be changed to 'portal to portal'" (R. 292). The sole issue upon which the conference was wrecked was the Union's demand for a $2.00 a day wage increase:

> "The United Mine Workers left no doubt on that point. What they wanted, first, foremost and all the time was a $2.00 a day wage increase."
> As Mr. Lewis stated to me and to all of us on many occasions, that meant two dollars, not a dollar and ninety-nine cents. . . . Throughout our entire proceedings, beginning in March until June 20, that was the demand. . . . There was never any suggestion . . . that they wanted to abandon the "face to face" method and go to "portal to portal". That was never the thing in mind. (R. 291-2).
>
> ". . . (The Union) at no time, in interpreting that demand and presenting it, urged or considered a real portal to portal demand, which would be a system in which the work day would begin at the portal and end at the portal, and throughout the period and until after the rejection of the First Illinois Agreement, there was never any suggestion made by any representative of the United Mine Workers for a change in the system from face to face to portal to portal" (R. 314).

As found by the National War Labor Board:

> " . . . *The United Mine Workers have not proposed to change the 'face to face' basis of payment.* On the contrary they have proposed merely to increase the hourly rate *under the present contract system.* . . . It would not be in fact payment to the mine workers for portal to portal. It is merely a general wage increase supported by the argument that the mine workers think

> they ought to have a general wage increase because on the average they will spend a certain amount of time in travel" (Ex. 38-A, June 18, 1943, R. 305, 759).

The language of the Union's demand with respect to wages and hours submitted to the 1943 Wage Conference pays lip-service to "portal to portal"—"to establish 'portal to portal' for starting and quitting time for all underground workers" (Ex. 35, R. 303, 722), but the implication of the words "portal to portal" in this language was immediately nullified by the succeeding demand which, under the heading "wage rate increases", after calling for a $2.00 a day flat wage increase for all classifications of inside and outside day men and equivalent increase for piece-workers, provides:

> "The increased rates *include* compensation to meet the 'portal to portal' starting and quitting time" (R. 722).

This meant not only that the *outside* men as well were to get the wage increases, which obviously had nothing to do with "portal to portal", but also that the increases were on the existing "face to face" basis, without any reference to the actual travel time, if any, of the particular employee. The District Court found the facts on this point as follows:

> "Thus, the 1943 demand of the Union is actually a demand for a flat wage increase to all mine workers, whether or not they spend any time traveling underground to their usual places of work, and not truly a contention that the Fair Labor Standards Act requires inclusion of the actual travel time as work time for those who have actual travel time underground" (53 F. Supp. 942, app. pet. 54-5).

(c) By Reason of the "Little Steel Formula" the National War Labor Board Declined to Approve the Union's Demands for a Flat Wage Increase in Their Successive

Forms on the "Face to Face" Basis. When it Finally Became Clear on August 24, 1943, that the Board was Firm in its Position, the Union was Faced with the Final Alternative of Abandoning the Wage Increase or the "Face to Face" Basis. Then, as a Last Resort, it Abandoned the "Face to Face" Basis.

The Union's demands, presented to the 1943 Wage Conference, for a flat wage increase on the "face to face" basis, were certified to the National War Labor Board by the United States Department of Labor on April 22, 1943, as hereinbefore noted, (supra, p. 38). These demands were denied by the Board upon the same ground on which they had been denied by the Operators—namely, the "Little Steel Formula" (R. 294). This Formula was the single reason for the failure of the demands. Had the issue been one between the Union and the Operators only, the Union would necessarily have won at least a portion of the increase by its use of the "strike weapon" (R. 176) which, as found by the District Court, it used,

> "even in time of war, to paralyze the production of bituminous coal in this country" (53 F. Supp. 948-9, app. pet. 70).

But the "Little Steel Formula," previously promulgated by the Board and now applied by it to the Union's demands, provided that:

> "no increases would be granted to any employees who had already received as much as a fifteen per cent increase" since January, 1941 (R. 294).

The Union undertook to ignore the Board. Its position, as stated by Mr. Lewis, was that

> "inflation was already here; that the stabilization program could not and should not be maintained and that

they were then doing and would do all they could to see that the stabilization program was not made effective so far as they were concerned" (R. 296).

With this in view, the Union absented itself from the Board hearings upon the Union's demands, stating through Mr. Lewis

> "that he could see no advantage in going before a Board that had already committed itself to a doctrine that would make it necessary to find against him" (R. 294).

However, the Board proceeded to

> "investigate the equities of the mine workers' case by the use of whatever reliable evidence it could procure, at the same time making every effort to assure procedural due process of law to the absent parties" (Ex. 35, R. 303, 719).

The Board's decision disallowing the Union's demands for a flat wage increase on the "face to face" basis was announced on June 17, 1943 (Ex. 38, R. 304, 738-749). Among the Board's findings were the following:

> "The mine workers' demand of $2.00 a day was . . . based upon an assumption or estimate that the travel time amounted on the average to an hour and one-half a day . . . The United Mine Workers proposed to spread this amount over all the workers *including those who did not go underground*, and so arrived at the proposed general wage increase of $2.00 for all mine workers . . . It is obvious that these figures are out of all proportion to any amount that could possibly be due to the mine workers under the Fair Labor Standards Act, even if the courts should decide all questions in controversy in favor of the mine workers. The demand is plainly and unmistakably a demand for an 'indirect wage increase in violation of the wage

stabilization policies,' contrary to the Board's directive order of May 25, 1943 . . . (R. 743).

"The further wage increase of $2.00 a day demanded now by the Mine Workers is an additional increase of 28.6% on top of the average increase of 18.2% which these wage earners have already received since January 1, 1941, or a total increase of 46.9%. It is obviously impossible for the War Labor Board to approve any such increase for the mine workers under the national wage stabilization policy. To approve it would fly in the face of decision after decision of this Board . . . (R. 748).

"The War Labor Board cannot fail to note that, by the insistence of the United Mine Workers, the negotiations for the new Appalachian Agreements have been carried on under conditions which violate the national no-strike agreement and are in themselves a defiance of the national wage stabilization policy". . . . (R. 748).

". . . the United Mine Workers, under the leadership of Mr. Lewis, have repudiated the no-strike agreement and insisted upon coming to the bargaining table with their demands in one hand and in the other hand the threat of a strike in an industry which affects the war production more vitally, perhaps, than any other industry. They have sought to use that threat, including the actual interruption of essential war production, to secure for themselves a favored position at a time when all responsible labor organizations in America have loyally adhered to the no-strike pledge" (R. 749).

The anxiety of the Union to retain the contract definition is measured by the above-described extraordinary lengths to which it went in seeking to obtain the wage increase without abandoning the definition. *This conduct cannot*

be squared with any conviction on the Union's part that the contract definition was illegal.

After this decision of the Board, the Union made its final effort.

It negotiated an agreement with the Illinois Coal Operators Association, a separate group, which was not a party to the Appalachian Wage Conference. This agreement, known in the record as the 'First Illinois Supplemental Agreement,' provided for an extension of the 1941 Agreement with certain modifications, of which the only one here pertinent is that which provided that

> "*each mine worker* shall be paid in addition to the sums provided for in said Wage Agreement and this Supplemental Agreement, the amount of $1.25 for each day worked, retroactive to April 1, 1943, and hereafter to April 1, 1945" (Ex. 39, R. 306, 772).

The Board considered this agreement and disapproved it under date of August 24, 1943, saying:

> "The Illinois mine workers have already had, since January 1, 1941, an increase in their straight-time hourly rates up to the limit of the Little Steel formula. *Their hourly rates are too high to permit the suggestion that they need to be increased for the purpose of correcting substandard conditions of living.* Therefore, under the national wage stabilization policy the War Labor Board could not approve a further general wage increase for these Illinois mine workers" (Ex. 39b, R. 306, 776).

This decision finally convinced the Union that due to the National Wage Stabilization Program it would be unable to obtain the desired increase without abandoning the contract definition. Accordingly, it then proceeded to negotiate a fresh agreement with the Illinois Coal Operators Association under date of *September 23, 1943*, which is

known in this record as the 'Second Illinois Supplemental Agreement' (Ex. 40, R. 307, 779-785), summarized by the Board as follows:

> "The Illinois Agreement now submitted to the Board *presents for the first time a true portal-to-portal method of compensation* for the mine workers. The 1941-1943 contract provides for a 7 hour day and 35 hour week of productive time at the working face, *excluding* travel time. * * * * * The Illinois Agreement proposes to substitute for this method a compensation for an 8 1-2 hour day *inclusive* of travel time, with payment at straight time rates for the 8 1-2 hours and overtime payment at rate and one-half for all time beyond 40 hours a week." (Ex. 40-A, R. 307, 786).

The National War Labor Board in considering this agreement compared the daily wage at straight time for eight and one-half hours provided by this agreement, with the daily wage for seven and three-quarter hours at *straight time and overtime* provided by the 1941 Agreement (averaging the travel time at an assumed forty-five minutes). It found on the basis of this comparison and assumption that the daily wage under this agreement exceeded the daily wage under the 1941 Agreement by thirty-seven and one-half cents, and to that extent it was unable to approve the Illinois Agreement (R. 787).

Thereupon, the Union negotiated with the Secretary of the Interior (who in the meantime had taken over the mines again for the government after the strike following the restoration in October—R. 309.) the Ickes-Lewis Agreement of November 3, 1943 (Ex. 41, R. 310, 793-5). This agreement adopted the Second Illinois Supplemental Agreement, with the modification that the lunch period was reduced from thirty minutes to fifteen minutes while the

"portal to portal" hours remained the same (R. 794), thus adding the additional fifteen minutes of working time (at time and one-half) needed to obtain the approval of the Board. The Board thereupon approved the Ickes-Lewis Agreement under date of November 5, 1943 (Ex. 41-A, R. 310, 795-6).

Thus the Union at long last abandoned the long established contract definition of the working day, but it is plain that it did so only after seeking by every means in its power, including prolonged defiance of the United States Government, to preserve the definition.

It is important to note that the Ickes-Lewis Agreement *was arrived at by collective bargaining and not on an assumption that the Act makes "portal to portal" mandatory.*

Furthermore this agreement, while abandoning the "face to face" basis, *does not by any means comply with a mandatory "portal to portal" basis.* Such a compliance would require, in the case of the coal loaders and other piece-workers, a separate wage calculation for each employee. The method of wage calculation under the Ickes-Lewis Agreement is to treat each employee arbitrarily as having forty-five minutes of travel irrespective of his actual travel time (Ex. 'H', Sec. 4, R. 346, 835-6). This method obviously operates to give some piece-workers more than they are entitled to and others less, since it is by the amount of the individual piece-worker's product that his hourly rate for application to the overtime is determined. The assumption of forty-five minutes of travel does not even yield average accuracy, since in one of petitioner's mines the average daily travel time is 88 minutes, and in the other is 67.1 minutes (R. 238-9).

(11) The Operators Adopted the Ickes-Lewis

Agreement through Collective Bargaining and Not Pursuant to the Act.

The narrative of the facts should probably be brought down to date in order that the Court may have the entire picture. The testimony in the case was closed on November 24, 1943, at which time the mines were still in the hands of the Government. Subsequent events, while not in the record, appear from governmental releases and the facts are not in dispute.

The statute under which the Government held possession of the mines was Section 3 of the War Labor Disputes' Act, 57 Stat. 163, 50 U. S. C. A. 1503, which provided that,

> "Any such plant, mine or facility . . . so taken . . . shall be returned to the owners thereof, as soon as practicable, but in no event more than sixty days after the restoration of the productive efficiency thereof, prevailing prior to the taking of possession thereof . . ."

The October, 1943, strike of the miners ended when the Ickes-Lewis Agreement was made on November 3, 1943. The "productive efficiency" of the mines was restored within a matter of days, but the Secretary of the Interior did not then return the mines to the owners. He let it be known to the operators that he did not deem it proper to return the mines until a contract was negotiated between the Union and the operators. He expressed from the outset the view which he subsequently stated in his letter of January 8, 1944, to the Attorney General, as follows:

> "The slogan, 'no contract, no work' continues to represent the basic attitude of the miners with respect to the production of coal . . . I am satisfied . . . that the present level of production is dependent upon continued Government possession until an operating agreement can be reached and approved."

The Secretary requested the Attorney General's opinion whether in view of the expiration of the sixty day period since productive efficiency was restored, the Government was required to return the mines to their owners. The Attorney General, by opinion dated January 14, 1944, replied that it was his opinion that the provisions of the statute did not require the return of the mines "under the circumstances outlined."

It was clear under the circumstances that the operators could not regain control of their property until they had reached an agreement with the Union. It was further clear that no more favorable contract than the Ickes-Lewis Agreement could be expected under current conditions. Accordingly the operators of the northern group made an agreement with the Union *by collective bargaining*, dated December 17, 1943, by which they adopted the provisions of the Ickes-Lewis Agreement. This agreement was approved by the National War Labor Board under date of May 19, 1944 (NWLB Release B 1533). Whereupon, the mines of that group were returned by the Government to private control. The following month the southern operators made a corresponding agreement with the Union and their mines were then returned to them.

The present situation is that the bituminous coal mines of the Appalachian area are operating under a contract between the Union and the operators which adopts the Ickes-Lewis Agreement, for a term ending March 31, 1945. This agreement, as hereinabove noted (supra, p 47), while not on the "face to face" basis, is not on an individual "portal to portal" basis either.

(12) A Mandatory "Portal to Portal" Definition of the Working Day Would, Under Normal Conditions of Competition, Create Practical Diffi-

culties in Operation which Could Not be Overcome.

It is a matter of common knowledge that during the existing war emergency, competitive conditions do not exist in the bituminous coal industry. There is an instant market for all coal which can be mined, at prices which press strongly against the ceilings imposed by governmental authority.

On the other hand, under the conditions which existed when the Act was passed and which may naturally be expected to return at the end of the war, the industry is intensely competitive. As said by the District Court:

> "The bituminous coal industry is *sui generis* . . . Its problems have been before Congress for many years. It is a highly competitive industry. Not only is there competition between the individual coal operators: there is competition between the northern operators and the southern operators, and always there is the sharpest kind of competition between the producers of bituminous coal and the producers of other fuels such as oil and gas. These conditions and many others are important factors which must be regarded in making up a wage structure for the bituminous coal industry. And in this industry, the wage structure is of peculiar importance because the cost of labor makes up approximately two-thirds of the cost of the production of coal" (53 F. Supp. 942, app. pet. 56).

There are two principal elements in the economy of the industry, namely, wage equality in relation to tons of product and area freight rates. The former is impossible without the "face to face" basis. The entire country-wide system of operating and of marketing is meshed and knit with that basis at many points. Its abandonment would under normal conditions deprive many units of their competitive position. The record makes this clear. O'Neill is

a very important and experienced figure in the industry. He went to work in the mines as a boy in 1898 (R. 124). He became an officer of the Union, and by 1916 was a member of its scale committee, representing the Union in the making of the wage agreements (R. 124). Subsequently, he became identified with management, and has become one of its leading national figures. His testimony in this case was not contradicted. Summarizing the essential function of the "face to face" basis in bringing about a state of equilibrium in the economy of the industry, he said:

> ". . . this whole scheme of marketing and distributing coal is predicated less upon location than any other largely, widely distributed commodity. In other words, there has been an attempt, so far as I understand it, to localize production and distribution of coal, and that does depend upon distance. As you get away into the outer reaches you have very small, relatively small freight rate differentials for a broad coverage of distances between mines. The same theory that blankets the destination for the consumption of coal and the same theory that blankets large groups of mines for the minimum freight rate to these consuming destinations is the same theory that has caused the mining industry *to predicate its wage structure on equal hours of work at your daily task*" (R. 166).

Morrow expressed the same thesis as O'Neill:

> "If the basis of compensation was fixed as the time the man worked at his working place, you equalize the competitive conditions to that extent between mines, and to that extent you stabilize the earning opportunities of the men in the mines". (R. 196).

The stabilization of competitive conditions through blanketing of freight differentials and equalization of earnings opportunities and of area wage rates has been the result of a course of development extending over a period of

many years and worked out, as to the essential features of equalized earnings opportunities and wage rates, through a long course of collective bargaining agreements with the Union. Lewis has himself recognized the essential influence of these factors in the stabilization resultant. He said:

> "The United Mine Workers of America, *in supplying a uniform, competitive labor cost for bituminous coal mining*, has been the only stabilizing force which the industry ever had" (testimony before NRA, August 9, 1933).

O'Neill anticipates that the Union will join with the operators in seeking a return to "face to face" upon the return of competitive conditions:

> "This condition that we are getting into here now is going to change the relationship between mines, between districts, and the whole competitive situation that we have had in this industry for fifty years is being revolutionized by this thing called portal to portal pay, and it is being done, in my opinion, without consideration of its consequences at all, or perhaps, may I say, with a recklessness that shouldn't be in an industry like this at a time like this. I think that every statement contained in the letter (i. e. the Houck Letter) will be proven to be correct . . . *I think the industry and the United Mine Workers will, as competitive conditions return, have to back away* from this portal to portal thing in order to insure the *maintenance of competition* between operators and to insure *maintenance of work* for their own people" (R. 144-5).

It should be noted that changes in the length of travel are constantly taking place not only as between mine and mine, but also as between miner and miner, day and day (R. 62-3). Consequently the "portal to portal" basis will under normal conditions introduce a new and powerful

variable, destroying the equilibrium which had been reached in the industry's economy.

Tetlow, the Union's leading witness, strikingly confirmed the necessity of wage "uniformity":

> ". . . the United Mine Workers have always felt that any relationship with their employer, and because of the competitive conditions existing, it was necessary to have a wage structure of general application in all the producing districts because of the competitive nature of the industry. They were striving for uniformity because they knew that *the competitive relationships were such* that unless these standards were applied uniformly, it would prevent and destroy the carrying out of any agreement" (R. 350-1).

O'Neill stated it thus:

> " . . . *the longer the travel time is*, as stated in this letter, *the less productive time* is going to be gotten for the same pay at the face. This will radically change the conditions of cost of production between long travel time mines and short travel time mines, and under the stress of competitive conditions, is bound to result in complete chaos as to the ability of these neighboring mines to compete with each other. This wage scale has been predicated throughout the years upon the basis of trying to preserve—*(1) a reasonably competitive condition as between mines within districts, and (2), to give the same amount of work opportunity for earning to the mine workers themselves*, so in the exercise of the day's work they would get the same yield of production as the miner in the next mine from them" (R. 144).

The inequalities of working time and earnings opportunity which "portal to portal" will cause between the piece-workers themselves under normal conditions are implicit in the quotation last above. This will obviously be a matter of much greater importance when the short day returns, on account

of the much larger proportion of the "portal to portal" day which will then be consumed by travel in the case of the coal loaders who have long-travel working places.

IV. SPECIFICATION OF SUCH OF THE ASSIGNED ERRORS AS ARE INTENDED TO BE URGED.

Specification 1.—The Circuit Court of Appeals Erred in Not According Due Weight to the District Court's Finding of Fact that Underground Travel Time is Not a part of the Workweek Within the Requirements of the Act.

Specification 2.—The Circuit Court of Appeals Erred in Deciding that it was Foreclosed by the Muscoda Case from Considering the Distinguishing Features of the Findings of the Respective District Courts in the Two Cases as to:

(a) Underground Travel in the Respective Mines;

(i) Supervision by the Employer.
(ii) Physical and mental exertion.
(iii) Activity necessary to be performed for the employer's benefit.
(iv) Conditions peculiar to the occupation of mining.

(I) "Conditions Replete with Hazards."
(II) "Conditions Requiring Physical Exertion and Mental Alertness."
(III) "Conditions Unpleasant and Burdensome to Those Encountering Them."

(b) Custom;

(c) Collective Bargaining Agreements;

(d) Other Relevant Facts and Circumstances.

Specification 3.—The Circuit Court of Appeals Erred in Deciding that it was Foreclosed by the Muscoda Case from Considering the Fact that the Ultimate Change of Front by the Union was Made in Such Circumstances as to Entitle its New Position to no Evidentiary Weight.

Specification 4.—The Circuit Court of Appeals Erred in Failing to Give the Bituminous Coal Ruling of the Administrator the Proper Weight or Any Weight.

Specification 5.—The Circuit Court of Appeals Erred in Ignoring the Practical Difficulties in Operation which would Result from Construing the Act so as to Make Mandatory the Portal to Portal Definition of the Working Day.

Specification 6.—The Circuit Court of Appeals Erred in Ignoring the Equities of the Case in Favor of Petitioner.

Specification 7.—The Circuit Court of Appeals Erred in Failing to Give the Legislative History of the Act any Weight in Construing it.

Specification 8.—The Circuit Court of Appeals Erred in Deciding that the Humanitarian Purpose of the Act is Decisively in Favor of the Interpretation now Contended for by Respondents.

V. THE ARGUMENT.

Preliminary Statement

The practical alternatives before this Court in the instant case are as follows:

(1) A decision reinstating the judgment of the District Court would do two things, both greatly to the long-range interest of the industry, both employees and employers:

(a) it would restore the definition of the working day, as between "face to face" and "portal to portal" and the

various possible modifications of each, *to the area of collective bargaining*, where it resided prior to the decision of the Circuit Court of Appeals in the instant case, while not requiring any change from the existing contract;

(b) it would relieve the industry of the overwhelming accrued potential liability for travel time which has accumulated in reliance upon custom, collective bargaining and the Administrator's ruling;

(2) A decision affirming the judgment of the Circuit Court of Appeals would codify and perpetuate the "portal to portal" definition, making it impossible for the industry to modify or change it no matter how greatly both employees and employers might wish to do so with the advent of changing circumstances.

Specification 1. — The Circuit Court of Appeals Erred in Not According Due Weight to the District Court's Finding of Fact that Underground Travel Time is Not a Part of the Workweek Within the Requirements of the Act.

The weight to which the District Court's findings are entitled in the appellate court under Rule 52 of the Federal Rules of Civil Procedure, was discussed in our brief in support of the petition for certiorari (pet. pp. 19-23), to which we here refer the Court. The principle is that the District Court's findings "shall not be set aside unless clearly erroneous" (Rule 52).

In the instant case the Circuit Court of Appeals erroneously held that the District Court's finding "as to whether upon the basic facts travel time was part of the workweek within the meaning of the statute" *was not a finding of fact*, but was a "*mere conclusion involving mixed questions of law and fact*,"—"*merely*" *an* "*interpretation*" of the "underlying facts" which the District Court "had placed upon those

facts" (145 F. 2d. 12, app. pet. 84). Having reached this erroneous conclusion as to the nature of the District Court's finding, the Circuit Court of Appeals, pursuant to that conclusion, failed to give the finding its due weight as a finding of fact under Rule 52.

The authorities are clear that in cases of this nature the Trial Court's finding is *a finding of fact*. We cited in our brief in support of the petition the points in the opinions of the Circuit Court of Appeals for the Fifth Circuit in the Muscoda Case dealing with this question (app. pet. 20-1), which carry the authority of this Court's affirmance. This Court has since specifically ruled upon the point in *Skidmore* v. *Swift & Co.* (Dec. 4, 1944),——U. S.——, 89 L. Ed. (adv. ops.) 125, 127, 64 S. Ct.——, as follows:

> "*We have not, and can not, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court.* Walling v. Jacksonville Paper Co., 317 U. S. 564, 572".

From this it is clear that the Circuit Court of Appeals erred in failing to consider the instant case independently upon its own facts in the light of the District Court's findings.

The holding of this Court in the *Skidmore Case* also sanctions the action of the District Court in the instant case in considering all of the facts in the case, including

> "scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct . . . and all the surrounding circumstances" (adv. ops. 127).

The holding also precisely sustains the position taken by the Administrator in his ruling in the instant case, in which he said:

". . . the determination of whether time spent in performing particular activities should be considered as hours worked depends upon the facts of the particular case. Accordingly each activity must be scrutinized in relation to all the facts of the case."

The Circuit Court of Appeals in the instant case erroneously declined to consider such facts and circumstances of the instant case (pet. 8-10).

There is this further point. It was said by Mr. Justice Jackson, in his concurring opinion in the Muscoda Case:

> *"A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error. Goodyear Tire & Rubber Co., Inc. v. General Dry Batteries, Inc.*, No. 262, October Term, 1943, decided February 28, 1944; *District of Columbia v. Pace*, No. 117, October Term, 1943, decided January 10, 1944; *Baker v. Schofield*, 243 U. S. 114, 118; *Williams Manufacturing Co. v. United Shoe Machinery Corp.*, 316 U. S. 364, 367." (App. pet. 144).

This Court has such "concurrent findings" before it in the instant case in practical effect. The Circuit Court of Appeals plainly indicated (v. pet. 8-9), in spite of its reversal of the District Court, that *except only* for the decision of this Court in the Muscoda Case *it would have affirmed the District Court*, saying that the District Court's finding and decision "would be convincing were it not for the (Muscoda) decision . . ." (145 F. 2d. 11, app. pet. 81). To the same effect the Circuit Court of Appeals said:

> *"In view of the long established custom in the coal industry not to include travel time in the work week, the collective bargaining contracts extending over a long period recognizing the "face to face" basis of pay, the testimony before the committees of Congress, the reason and purpose of the Fair Labor Standards Act*

and the probable effects and consequences of construing the act to require travel time in bituminous coal mines to be included in the workweek, there is strong reason for thinking, as everyone connected with the matter seems to have thought until recently, that it was not the intent of Congress that the act should be so construed in its application to the coal mining industry." 145 F. 2d. 11, (app. pet. 81).

Hence petitioner is essentially entitled to the position in this Court of a litigant who has in his favor concurrent findings of both Courts below upon the single question of fact in issue.

The Circuit Court of Appeals misconstrued the general language of this Court in the Muscoda Case and misconceived the effect of that language, inferring therefrom that this Court, while it "made reference to the findings below" in the Muscoda Case, was of opinion that "*irrespective of the findings* . . . travel of the sort here involved should be considered work within the meaning of the statute . . ." (145 F. 2d. 11, app. pet. 82). Proceeding from this premise, the court arrived at the erroneous conclusion that it was inhibited by the Muscoda Case from scrutinizing the findings of specific facts in the two respective cases for their distinguishing features.

This was manifest error. In view of Rule 52, this Court did not arrive at its decision in the Muscoda Case "irrespective of the findings", and would not so arrive at its decision in the case at bar. It is true that this Court held that under the facts and circumstances, and in the light of the District Court's findings of fact, in the Muscoda Case, the underground travel in that case was work within the meaning of the statute. But this Court did not decide in the Muscoda Case that underground travel in the mines there involved was "the same sort of thing" (145 F. 2d. 12, app. pet. 84)

as travel in petitioner's mines in a different industry and under widely different conditions, facts and circumstances. Nor did it decide that the underground travel in the Muscoda Case was sufficiently "the same sort of thing" to justify the Circuit Court of Appeals in making the general language of this Court in the Muscoda decision decisive of the case at bar. The term "the same sort of thing" is obviously relative and indefinite, and is wholly insufficient to bridge the wide gap between the facts in the two cases.

The Circuit Court of Appeals, in making the general language of the Muscoda decision decisive of the instant case "irrespective of the findings", violated an important and familiar principle of procedure to which we referred in our brief on the petition (pet. 18-19), namely, that *the decisive effect of judicial language is to be confined to the evoking factual setting*. This principle was recently reaffirmed by this Court in *Armour & Co.* v. *Wantock* (Dec. 4, 1944), ——U. S.——, 89 L. ed. (adv. ops.) 120, 125, 64 S. Ct. ——, in which it was said in an opinion by Mr. Justice Jackson:

> "It is timely again to remind counsel that *words of our opinions are to be read in the light of the facts of the case under discussion.* To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading."

Pursuant to that principle, the Circuit Court of Appeals should not have taken the general language of this Court in the Muscoda decision as precluding consideration of the merits of a distinct state of facts. That the facts of the case at bar are indeed distinct from those of the Muscoda Case

is readily demonstrable, as will be shown in the next succeeding specification.

Specification 2. — The Circuit Court of Appeals Erred in Deciding that it was Foreclosed by the Muscoda Case from Considering the Distinguishing Features of the Findings of the Respective District Courts in the Two Cases as to:

(a) Underground Travel in the Respective Mines;
(b) Custom;
(c) Collective Bargaining Agreements;
(d) Other Relevant Facts and Circumstances.

If the Circuit Court of Appeals had felt at liberty to consider the specific findings, it would necessarily have concluded that the instant case presents a state of facts which is far from identical with that of the Muscoda Case, as is demonstrated by the following analysis.

(a) Underground Travel in the Respective Mines.—

In the Muscoda Case the District Court found certain conditions of underground travel in the iron ore mines which bore "every indicia of worktime" (40 F. Supp. 10, app. pet. 102), namely:

(i) Supervision by the employer.
(ii) Physical and mental exertion.
(iii) Activity necessary to be performed for the employer's benefit.
(iv) Conditions peculiar to the occupation of mining.

These items compare as follows with the facts in the instant case.

(i) *Supervision.*—With regard to reporting for work: in the Muscoda Case the men report for work at the "tally-house" near the mine entrance (88 L. Ed. (adv. ops.) 613, app. pet. 134), while in the instant case they report for work "at their places of work" (53 F. Supp. 938, app. pet. 46).

With regard to general supervision of the underground travel: the District Court in the Muscoda Case found that the transportation "was had under the strict control and supervision" of the employers, "exercised in the interest of efficient operation of their mining business" (40 F. Supp. 10, app. pet. 101-2), while in the instant case supervision is limited to the employment of safety rules and regulations (53 F. Supp. 939, app. pet. 49), prescribed by the public authorities (R. 381-2), the authority of the foreman in charge of the trip being equivalent to that of the conductor of a train (R. 226, *supra*, p. 26).

The District Court in the Muscoda Case further found the following details of supervision: the employer

> "prescribed the schedule of the trips, the speed of the trips, the loading of the men into the trips, the rules of conduct during the trips, and in most cases required the men to ride the trip rather than walk" (40 F. Supp. 10, app. pet. 101-2).

In the instant case, the only item in common with the above is, that petitioner prescribes the schedule of the trips, for the obvious purpose of assuring that the employees with the longest travel would start first so as to save the time of those with shorter distance to go (53 F. Supp. 939, app. pet. 48-9). With regard to the speed of the trips, that feature in the instant case is determined by mining law and not by petitioner (R. 164). With regard to the loading of the men into the trips, the supervision in petitioner's mines was limited to a prohibition against crowding, whereas in the

Muscoda Case overcrowding appears to have been required by the employer—"crowded to the extreme" (40 F. Supp. 9, app. pet. 101); "ten men sit on each mantrip car, while from 30 to 40 are crowded into an ore skip . . . they thus ride in a close 'spoon fashion' . . . broken ribs, injured arms and legs, and bloody heads often result; even fatalities are not unknown" (88 L. ed. (adv. ops.) 613, app. pet. 135). With regard to the rules of conduct during the trip, these in petitioner's mines are prescribed by mining law and not by petitioner (R. 381-2, Ex. I, R. 496) as above noted, while the converse was true in the Muscoda Case (40 F. Supp. 10, app. pet. 101). With regard to the requirement of riding rather than walking, the finding in the Muscoda Case was that the employers refused to permit the miners to walk rather than ride (88 L. ed. (adv. ops. 613), app. pet. 135), whereas in petitioner's mines that feature is optional (R. 218).

(ii) *"Physical and Mental Exertion."*—In the Muscoda Case the physical exertion was shown to result from the overcrowding of the skips and the condition of the mine haulways, while the mental exertion related to the hazards encountered. In petitioner's mines there was no overcrowding as just above noted, the feature of hazard was insignificant as will be noted just hereinafter, while the District Court found in general under this head that *"no work or labor is required of employees riding on mantrips"* (53 F. Supp. 939, app. pet. 49).

(iii) *"Activity Necessary to be Performed for the Employer's Benefit."*—In contrast to the finding in the Muscoda Case under this head, in petitioner's mines, the mantrips "constitute a benefit to both employer and employees" (53 F. Supp. 939, app. pet. 48).

(iv) *"Conditions Peculiar to the Occupation of Min-*

ing."—Under this head the District Court in the Muscoda Case listed the following (40 F. Supp. 10, app. pet. 101):

(I) "Conditions Replete with Hazards."

(II) "Conditions Requiring Physical Exertion and Mental Alertness."

(III) "Conditions Unpleasant and Burdensome to Those Encountering Them."

(I) "Conditions Replete with Hazards."—In the Muscoda Case this Court said:

> "The exacting and dangerous conditions in the mine shafts stand as mute, unanswerable proof that the journey from and to the portal involves . . . hazards to life and limb" (——U. S.——, 88 L. ed. (adv. ops.) 615, 64 S. Ct.——, app. pet. 138).
>
> "They are forced to jump several feet into the skip from the loading platform . . . with resulting injuries to ankles, feet and hands"——U. S.——, 88 L. ed. (adv. ops.) 613, 64 S. Ct.——, app. pet. 135).

In contrast, the finding in the instant case is that riding the mantrips is "less hazardous than other phases of mining operations" and "the injuries . . . received by employees in plaintiff's mines on mantrips are surprisingly few in number and extent" (53 F. Supp. 939, app. pet. 49). Respondents in their brief in opposition to the petition for certiorari (p. 7) sought to lighten the effect of the District Court's finding of absence of hazard on the mantrips by mentioning several serious accidents with the implication that these had occurred on mantrips in petitioner's mines. However, the court's finding was made on a conflict of testimony as to the circumstances under which the serious injuries had occurred. Testimony for petitioner in conflict with that for respondents was that the serious injuries did not occur on mantrips (R. 525, 482). Hence the statement in respondents' brief

must yield to the District Court's finding on a conflict of evidence.

(II) Conditions Requiring Physical Exertion and Mental Alertness.—This item has been dealt with hereinabove.

(III) Conditions Unpleasant and Burdensome to Those Encountering Them.—Under this head, in the Muscoda Case, the finding was that the mantrips were operated in air that "was humid and malodorous, the ventilation relatively poor, and the heat increasing with descent into the mine (40 F. Supp. 9, app. pet. 101). In contrast, the positive evidence in the instant case showed that the temperature in petitioner's mines remains constant throughout the year at 58 to 65 degrees (R. 94); that there is no descent, the haulways being practically level (R. 84); that there are no odors on the travelways (R. 499); that there is a constant and adequate circulation of fresh air—more than the legal minimum—by electrically operated fans (R. 92-3); and that there is no heat or humidity (R. 94).

The finding of the District Court is that in petitioner's mines, "riding on mantrips while definitely not luxurious, is neither painful nor unduly uncomfortable (53 F. Supp. 939, app. pet 49) and that "I have found no such painful and burdensome conditions as those described in the iron ore mines" (53 F. Supp. 949, app. pet. 71), thus constituting a definite finding of *absence* of the conditions upon which the finding of the Court was based under this head in the Muscoda Case. O'Neill said: "You can't run pullman trains in a coal mine, but there is no more discomfort in a ride on a trip of mine cars at six miles per hour than there is in sitting in that chair" (R. 164).

(b) Custom.—

In the Muscoda Case the finding under this head was that

while the plaintiffs contended that "custom has always and universally" established the "face to face" basis, "the evidence has disclosed no such custom" (40 F. Supp. 7, app. pet. 95-6).

> ". . . No custom existed that would indicate that the phrases 'employ' and 'workweek', used in Section 7 of the Act, would be understood, in their application to underground iron ore mining, to exclude such time from their purport" (40 F. Supp. 7, app. pet. 97).

In contrast, the finding in the case at bar is that the " 'face to face' basis is traditional . . . and *has universally been the basis* for the determination of hours of labor . . . for approximately the past fifty years" (53 F. Supp. 939, app. pet. 50).

(c) Collective Bargaining Agreements.—

In the Muscoda Case the District Court found that "the methods of payment of wages were dictated almost entirely by the employers . . . It cannot be said that . . . the proposition that the time in question is not work time" was with the "free and uncoerced agreement" of the iron ore miners (40 F. Supp. 8, app. pet. 97), who "prior to the enactment of the . . . Act . . . repeatedly made efforts to obtain full, or at least a larger partial, compensation for so-called travel time" (40 F. Supp. 8, app. pet. 97). In contrast, the finding in the instant case regarding the "strong and powerful" union has been mentioned hereinbefore (*supra*, p. 12).

Moreover, in the bituminous coal mining industry, as pointed out before (*supra*, pp. 8-10):

> "This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years and *is the result of collective bargaining in its complete sense*" Houck Letter, 53 F. Supp. 951-2, (app. pet. 77).

(d) Other Relevant Facts and Circumstances.

In the view which the Circuit Court of Appeals took of this case, it felt constrained, as hereinbefore pointed out, to ignore the findings of the District Court on the surrounding facts and circumstances, such as custom and collective bargaining, considering that this Court had held that such facts were "immaterial in any event" (*supra*, p. 59). This Court held in the *Skidmore Case, supra,* (89 L. ed. (adv. ops.) 127), that just such facts, including the

> "agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances,"

are relevant and material in just such a case as this under the Act.

Such facts in the case at bar may be summarized as follows:

(i) Fifty years of custom and contract, which had no parallel in the Muscoda Case (*supra*, p. 9).

(ii) The NRA Bituminous Coal Code, with its adoption of the contract definition, which had no parallel in the Muscoda Case (*supra*, p. 13).

(iii) The Bituminous Coal Act of 1937 and the hearings and proceedings before the Bituminous Coal Commission during the years 1938-40, which had no parallel in the Muscoda Case (*supra*, pp. 30-31).

(iv) The legislative history, with its specific discussion of the bituminous coal industry and its clear indication that Congress did not intend to disturb the industry's existing

standards of wages and hours, which had no parallel in the Muscoda Case (*supra*, pp. 29-35, *infra*, pp. 77-79).

(v) The Houck Letter and the circumstances which evoked it, which had no parallel in the Muscoda Case (*supra*, pp. 15-20).

(vi) The Administrator's ruling and the weight to which it is entitled, which had no parallel in the Muscoda Case (*supra*, p. 20, *infra*, p. 71).

(vii) The collective bargaining agreements subsequent to the effective date of the Act, namely, the 1939 Agreement, the 1941 Agreement and the 1943 Six-day Week Agreement, with their clear implications that no one connected with the industry believed that the Act invalidated the contract definition of the working day, which had no parallel in the Muscoda Case (*supra*, pp. 14, 22, 38-48).

(viii) The Union's prolonged efforts, "vigorous and forceful to the last degree" (R. 296), to obtain a wage increase in 1943 without abandoning the contract definition, with their necessary implication that the Union still believed the definition legal up to the date when the National War Labor Board disallowed the First Illinois Supplemental Agreement, which had no parallel in the Muscoda Case (*supra*, p. 45).

(ix) The practical difficulties in operation which would result from a mandatory "portal to portal" definition of the working day and which could not be overcome under normal conditions of competition, which had no parallel in the Muscoda Case (*supra*, pp. 50-54, *infra*, p. 72).

(x) The equities in favor of petitioner, which had no parallel in the Muscoda Case (app. pet. 26-40, *infra*, p. 75).

This surely throws an impressive, nay an overwhelming,

weight on petitioner's side of the scale. The word "work" in the Act has no technical meaning, nor has it in the bituminous coal mining industry. That is "work" in both, which is "work" in the common use and acceptation of the persons who have daily occasion to mention it. These necessarily are the persons in the industry. These have spoken with unanimous voice in this record, over a period of fifty years, and under circumstances which must again and again have made dissent vocal, if dissent had existed.

Should John L. Lewis know what is work in this industry? If so, read his brief and his testimony on the NRA Code, his testimony on this Act; look at his sentiments expressed in the Houck Letter; look at his signature set to the long succession of basic wage agreements. He certainly never believed that this underground travel was work.

Should Charles O'Neill know? His testimony is plain.

The Circuit Court of Appeals found no testimony in the record to create a conflict. They reversed solely on the ground of the Muscoda Case, and *not on the Muscoda record, for that was not before them, but on general language in this Court's opinion, applicable not to the record before them, but to a very different state of facts.* This was surely error.

Specification 3.—The Circuit Court of Appeals Erred in Deciding that it was Foreclosed by the Muscoda Case from Considering the Fact that the Ultimate Change of Front by the Union was Made in Such Circumstances as to Entitle its New Position to no Evidentiary Weight.

As has been shown hereinbefore (*supra*, p. 41), the Union reversed its official position in favor of preserving the contract definition only in order to open a passage to a wage increase after all other approaches had failed. This

eleventh hour conversion ought not to be accorded any weight as evidence upon the issue in this case. The point is crisply phrased by Judge Soper in his dissenting opinion:

> ". . . *This change in front on the part of the miners for bargaining purposes, when making an agreement for future operations, could not affect the condition which formerly existed in the industry or transform into work time that which was not work time in the generally accepted meaning of the term that had prevailed in the industry for a long time when the statute was passed and that continued to prevail with administrative sanction for five years after its enactment. The statute could not have one meaning in the earlier and another meaning in the later period*" (145 F. 2d. 15, app. pet. 90).

Specification 4. — The Circuit Court of Appeals Erred in Failing to Give the Bituminous Coal Ruling of the Administrator the Proper Weight or Any Weight.

The thorough and prolonged consideration which the Administrator gave to the issue here has been shown hereinbefore (*supra*, pp. 15-21), a consideration which overlapped his consideration of the corresponding issue in the iron ore mining industry. He found such different facts that he made converse rulings relative to the two respective industries. As pointed out in our brief on the petition (pet. pp. 22-24), the District Court in the Muscoda Case leaned heavily upon the Administrator's ruling in that industry, while the District Court in the instant case correspondingly leaned heavily upon the Administrator's ruling in this case.

The Circuit Court of Appeals erred in ignoring the Administrator's ruling in the bituminous coal mining industry. This Court recently had occasion to consider the effect of the Administrator's rulings and the weight to be accorded them

by the courts. In *Skidmore v. Swift & Co., supra,* (89 L. ed. (adv. ops.) 125, 127-9), it was said by this Court in an opinion by Mr. Justice Jackson, with reference to the Administrator's ruling on a question analogous to the present one, as follows:

> ". . . Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity, and a knowledge of the customs prevailing in reference to their solution. From these he is obliged to reach conclusions as to conduct without the law, so that he should seek injunctions to stop it, and that within the law, so that he has no call to interfere. He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. *They provide a practical guide to employers and employees* as to how the office representing the public interest in its enforcement will seek to apply it. Wage and Hour Division, Interpretative Bulletin No. 13."
>
> ". . . the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case . . . Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.
>
> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not

controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. . . ."

The above quoted expression of this Court clearly approves the action of the District Court in leaning strongly upon the Administrator's bituminous coal ruling. The District Court said:

> "It seems to me that this particular administrative ruling is entitled to even more than the "great weight" to which the Supreme Court said such rulings were entitled generally, by reason of the thoroughness with which the Administrator went into the question before making his ruling" (53 F. Supp. 945, app. pet. 62).
>
> "I do not find anything in this record which satisfies me that this ruling was plainly wrong; in fact, I find nothing which casts doubt upon its correctness. Giving to it the 'great weight' to which the Supreme Court has said it is entitled, it is my conclusion to follow and sustain this ruling" (53 F. Supp. 946, app. pet. 64).

In this it seems clear that there was no error.

Specification 5. — The Circuit Court of Appeals Erred in Ignoring the Practical Difficulties in Operation which would Result from Construing the Act so as to Make Mandatory the Portal to Portal Definition of the Working Day.

A decent regard for the elementary discretion of a law making body should restrain the courts from so interpreting a statute as to produce an impracticable or ruinous result unless no other reasonable interpretation can be made. This record shows the disastrous results to be apprehended under normal conditions of competition if "portal to portal" is found to be mandatory under the Act (supra, pp. 49-54). It is to be noted that not only are these views uncontradicted

in the record but that they were shared by the leaders both of the Union and of the operators. The statement in the Houck Letter that the result of construing the Act to make "portal to portal" mandatory "would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States" and that it would confront the wage conference "with an issue that would be almost impossible of solution by agreement, resulting in an industrial conflict that could paralyze the nation" (53 F. Supp. 953, app. pet. 78), was jointly composed and subscribed by the leaders of both elements. The testimony of O'Neill, Morrow, Burke and St. Clair at the trial to the same effect (R. 143, 192-3, 297, 80), was not sought to be contradicted by the Union.

The only reply which the Union can make now, and does make, is that "it is a matter of common knowledge that the majority of the coal operators throughout America have gone upon a portal to portal basis" (br. for resp. in opp. to pet. p. 10). But that reply misses the point. The operators have not gone upon a *statutory* "portal to portal" basis, but have accepted an agreement including a modified "portal to portal" plan in which the amount of travel time is assumed and applied alike in all cases. And besides the Act is to be construed in the light of normal conditions in the industry, conditions which prevailed when the Act was passed, conditions which may reasonably be expected to return at the end of the war. Under those conditions the industry was, and will inevitably again become, "a highly competitive industry" (53 F. Supp. 942, app. pet. 56). It was to those conditions that the Houck Letter and the testimony in the record referred.

But present conditions in the industry, the conditions un-

der which the Ickes-Lewis Agreement was negotiated and which still prevail, are not competitive. It is a matter of common knowledge that the industry is unable to supply the wartime demand for coal, and that all the coal that can be produced is sold without the shadow of effort at the price ceilings fixed by the Government; ceilings which are fixed so as to enable all operators to produce at a profit notwithstanding the great increase in operating costs resulting from "portal to portal" and other wage increases which have been made during the course of the war period.

The views expressed in the Houck Letter were perfectly sound, as a consideration of the state of the industry under normal conditions must show, and the vindication of those views will come, as O'Neill said, "as competitive conditions return" (R. 145), when price ceilings will be meaningless.

It is also argued by the Union that the Ickes-Lewis Agreement and the succeeding agreements by which the operators adopted the Ickes-Lewis Agreement, "recognize that coal miners *are entitled* to pay from portal to portal" (br. for resp. in opp. to pet. p. 8). That is an unsound argument. The agreements carry no such implication. They do not mean that Mr. Ickes ruled, or that the National War Labor Board held, or that the operators have conceded, that the *Act required* the change to "portal to portal". The fact was that the Union, under present wartime conditions obtained these agreements, and the wage increases thereby provided, *through collective bargaining*, first with Mr. Ickes, and then with the operators. The situation was such that the operators concluded that it was to their interest to *agree* to the "portal to portal" feature of those agreements (supra, p. 49). They did this in the field of *contract* not of *statutory compulsion*.

So long as the Act is not construed by the courts to make

the "portal to portal" basis mandatory, the parties have the right to operate upon the "portal to portal" basis or upon the "face to face" basis as they may from time to time agree. But if the courts make permanent a construction of the Act which the Union advanced for temporary purposes only (purposes which were obtained without the statutory compulsion), then the door will be locked, the field of *"status"* will be substituted for that of *"contract"* (in Sir Henry Maine's phrase), and the parties will not be able, upon the restoration of normal conditions, to make such modification of the "portal to portal" definition as the changing circumstances may make advisable from the standpoint of both sets of interests. If the question was left by Congress in the field of contract as petitioner contends, it may be solved by the parties from time to time by collective bargaining in the future as in the past.

The instant case does not present merely a mutually exclusive issue of "face to face" or "portal to portal". The Act sets *minima* as to wage standards, not *maxima*. Hence nothing forbids employers to pay wages for activities or inactivities of their employees which are not *required* by the Act to be considered as work time and compensated for as such.

Specification 6. — The Circuit Court of Appeals Erred in Ignoring the Equities of the Case in Favor of Petitioner.

These equities were pointed out in our brief in support of the petition, pp. 26-40. The Act should not be construed so as to bring about an unconscionable result unless it cannot be reasonably interpreted so as to avoid such a result.

The operators, since the effective date of the Act, relied upon the concurring views of all parties concerned — the

Union, the Administrator, the operators themselves — that the Act did not invalidate the contract definition, and that no potential liability was accumulating for overtime on account of underground travel. With regard to their right to rely upon the ruling of the Administrator, this Court recently said, in *Skidmore v. Swift & Co., supra,* (December 4, 1944), (89 L. ed. adv. ops. 125, 127-8):

> (The Administrator) . . . "has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. *They provide a practical guide to employers and employees* as to how the office representing the public interest in its enforcement will seek to apply it. Wage and Hour Division, Interpretative Bulletin No. 13."

In the above quoted passage the Administrator's Interpretative Bulletin No. 13 was inferentially approved. It was that bulletin, as pointed out hereinbefore (supra, p. 20), which was quoted in the Houck Letter, and which the Administrator applied in his bituminous coal ruling.

In consideration of the equities, special attention should be given to the effect of the Six Day Week Agreement of February 10, 1943 (pet. p. 33). That agreement, if the construction of the Act now contended for by the Union is sustained, immensely accelerated the accumulation of potential overtime claims by adding several hours of overtime *per employee, per week, at the hourly overtime wage of $1.50.* When it is recalled that the Union has approximately 450,000 members, the wholly disastrous effect of that one recent agreement under the majority opinion of the Circuit Court of Appeals is readily envisioned.

Another highly important equity arises out of *the impracticability of changing the contract definition to "portal to*

portal" at the time when the Act became effective (pet. p. 32). This is clear from the following:

First, as stated in the Houck Letter, "the great amount of money involved" (53 F. Supp. 953, app. pet. 78) would have been such that "a negotiated adjustment would seem to be impossible." This is wholly uncontradicted;

Second, no justiciable controversy existed because there was no difference of opinion in the industry upon the point, and interpretation by the Courts could not have been had;

Third, the Union could not then have advanced its present contention because it could not have contemplated the friction which favorable action would have created among its own members, owing to the great resulting inequality of earnings and of effort on the basis of the seven hour day. O'Neill made the point clearly in referring to the motorman who is paid for operating the mantrip which carries employees who are paid the same merely for riding it (R. 143).

In general as to the equities, it is fair to say that the injustice of the judgment is so manifest and so profound as to shock the conscience. It permits the employees to depart from their own solemnly executed and many times affirmed contract, to recant their many protestations of its validity and propriety, and to collect very great, and perhaps overwhelming, damages from petitioner solely for its faithful performance of that contract.

Specification 7. — The Circuit Court of Appeals Erred in Failing to Give the Legislative History of the Act any Weight in Construing it.

As has been shown hereinbefore (*supra*, p. 29) the Congressional debates and committee proceedings brought out clearly that it was not the intention of Congress "to interfere in any way with the wage structure of the bituminous

coal industry" (53 F. Supp. 944, app. pet. 60). The committee reports, the testimony and the debates show this both positively, by the explicit references to that industry and by the large and fresh Congressional knowledge of conditions therein, and negatively by explanations of the character of conditions which the Act was designed to relieve.

This Court has held that it is proper to refer to the Congressional proceedings for light upon the legislative intent in cases like the present.

In U. S. v. Local 807 of International Brotherhood of Teamsters, etc. of America. et al (March 2, 1942), 315 U. S. 521, 528-530, 86 L. ed. 1004, 1009-1010 which involved the construction of the Anti-Racketeering Act. It was said in an opinion by Mr. Justice Byrnes:

> ". . . Confronted with these various interpretations we turn for guidance to the legislative history of the statute. Pursuant to a Senate Resolution of May 8, 1933, a sub-committee of the Senate Committee on Interstate Commerce, which became known as the Copeland Committee, undertook an investigation of 'rackets' and 'racketeering' in the United States.
>
> ". . . Thereafter, while the bill awaited the signature of the President, Senator Copeland submitted a report in which he referred to S. 2248 as one of the eleven bills which had been enacted 'to close gaps in existing Federal laws and to render more difficult the activities of predatory criminal gangs of the Kelly and Dillinger types.'
>
> "This account of the legislative proceedings obviously does not provide specific definition of 'wages', 'bona fide employer', or 'bona fide employee', as those terms are used in 2 (a). But it does contain clear declarations by the head of the Department which drafted the section and by the sponsor of the bill in Congress, first, that the elimination of terroristic activities by profes-

sional gangsters was the aim of the statute, and second, that no interference with traditional labor union activities was intended".

The Act here, like the Anti-racketeering Act, provides no specific definition of the questioned terms but, to paraphrase the language of the Teamsters decision, "it does contain clear declarations by the President of the United States and by the sponsors of the bill in Congress and by numerous others, without expression of dissent, first that the elimination of sweatshops and child labor was the aim of the statute, and second that no interference with bona fide collective bargaining was intended."

In *Western Union Telegraph Company v. Lenroot* (January 8, 1945) ——U. S.——, a case involving the child labor provision of the Act, this Court in an opinion by Mr. Justice Jackson considered in detail the legislative history of the Act for light upon the question whether Western Union messengers were within the coverage of the Act and ascertained from that history that Congress in considering the bill had rejected provisions which if enacted would have sustained the contention of the children's bureau in the case.

We point out that neither in the Teamsters case nor in the Western Union case did this Court follow any clearer implication from the legislative history than is afforded here.

Specification 8. — The Circuit Court of Appeals Erred in Deciding that the Humanitarian Purpose of the Act is Decisively in Favor of the Interpretation now Contended for by Respondents.

The Circuit Court of Appeals quoted the general language from this Court's opinion in the Muscoda Case ex-

pressing the humanitarian purpose of the Act and stating that "it must not be interpreted or applied in a narrow, grudging manner" and that the Act "was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him for only a part of it" (145 F. Supp. 11, 12, app. pet. 82, 85).

The Circuit Court of Appeals was of opinion that this general language is decisive of the instant case as well, but the Circuit Court of Appeals failed to note that the instant case does not present those facts which in the Muscoda Case led this Court to conclude that the humanitarian purpose of the Act demanded a decision there in favor of the employees. The important point is that in the present record the evidence is uncontradicted and comes from the leaders of both parties, that under normal competitive conditions the "portal to portal" basis would "create so much confusion in the bituminous industry as to result in complete chaos. . ." (53 F. Supp. 940, app. pet. 52). This record provides no basis upon which a finding can be made that to construe the Act to require mandatory "portal to portal" would subserve the best interests of either employees or employers in this industry. So to hold would "codify and perpetuate" the "portal to portal" basis at all events and under all circumstances. The testimony is uncontradicted and it is surely clear as a matter of common sense, that an enlightened self-interest in the industry demands that the parties be left free to solve the issue here from time to time through collective bargaining in the light of the changing conditions that must develop.

CONCLUSION

Petitioner believes that it is clear upon the law and the

facts that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court reinstated.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 721

JEWELL RIDGE COAL CORPORATION, a Corporation, *Petitioner*,

v.

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, an Unincorporated Association, Affiliated with the International Union, United Mine Workers of America, et al., *Respondents*.

REPLY BRIEF FOR PETITIONER

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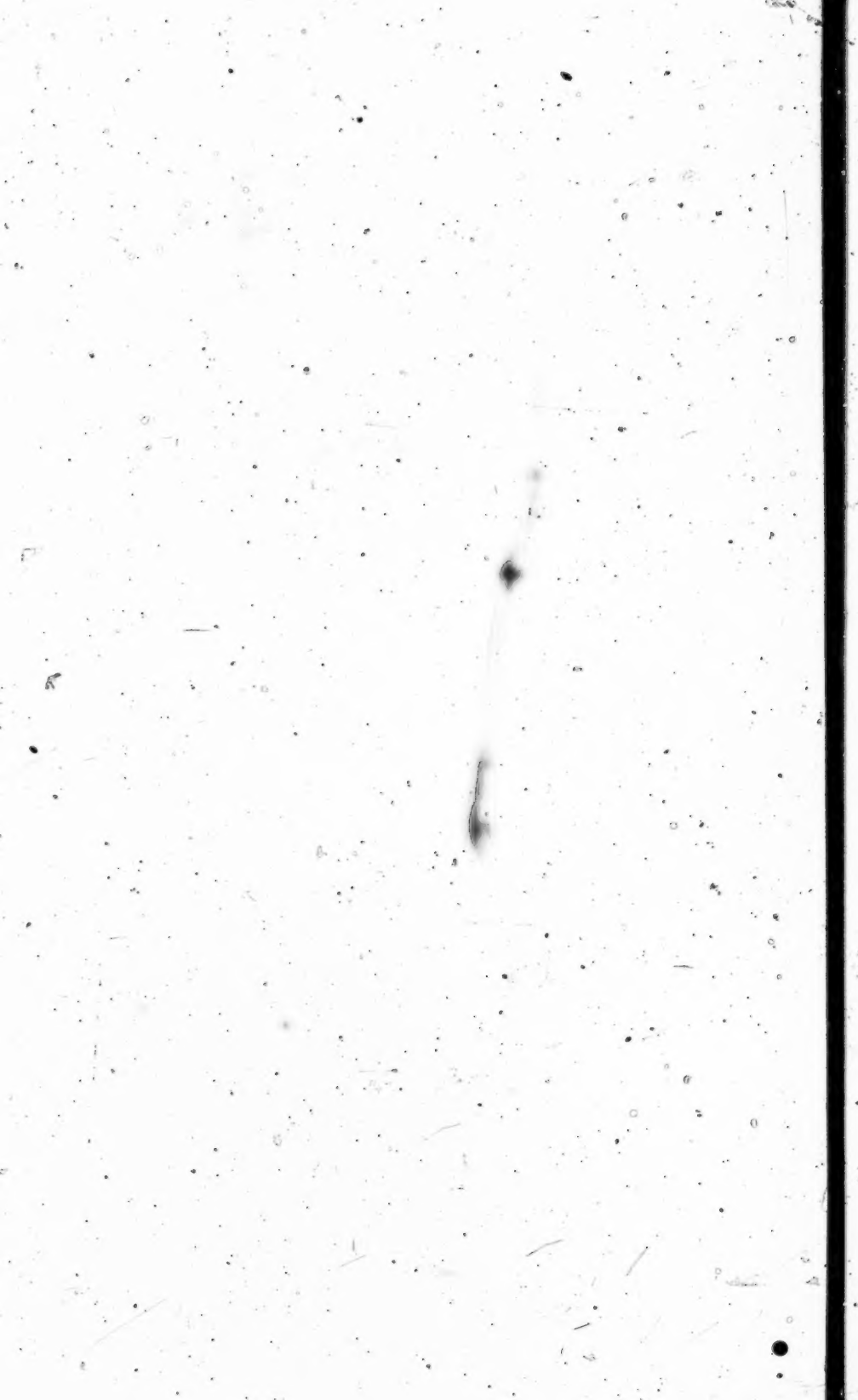

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 721

JEWELL RIDGE COAL CORPORATION, a Corporation, *Petitioner*,

v.

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, an Unincorporated Association, Affiliated with the International Union, United Mine Workers of America, et al., *Respondents*.

REPLY BRIEF FOR PETITIONER

Much of respondent's brief is composed of statements which are in conflict with the District Court's findings of fact. We mention some of these.

1. Petitioner's Underground Employees Do Not Report for Work at the Portal of the Mine.

Respondent's assumption that the men " were required to report, and did report, for work **at the portal**" (Br. 12), ignores the contrary testimony, and the contrary finding of the District Court (Petitioner's Br. p. 24). Petitioner's underground em-

ployees were required to report for work, and did report therefor, at their usual working places.

2. The "Surrender of Their Will" by Employees in Underground Travel is Not an Effective Test.

Respondent says that when "the employees **reported** at the portal, they had surrendered their will to the will of the master" (Br. p. 12), and concludes from that premise that the line of demarcation between non-work and work is located at the portal. This supposed test is indecisive and irrelevant. Respondent made the same contention before the District Court. On this point the court said:

> "In this case, more than 400 employees travel from their homes to the mines in trucks and buses operated by the company. If they are entitled to pay for the time spent in traveling from the portal of the mine to their usual places of work, might it not also be contended that they are entitled to pay for the time spent in travel from the points where they board the trucks and buses to the mines? If "surrender of freedom of action" be any criterion, as contended by defendants' council, do not these employees surrender their "freedom of action" when they become passengers on plaintiff's vehicles?" (App. pet. 72-3, 53 F. Supp. 950).

It is true that while on the mantrip the miner is required to abide by certain regulations of mining law looking to safety of travel (if he is one of those who walk in, he does not), but it is equally true that on the highway before reaching the mine, he must abide by corresponding regulations. If he must "sit in the mancars on the opposite side from the trolley wire" (Br. p. 19), he also has no choice as to the side of the highway on which he will drive or will walk. If the speed of the mantrip is regulated (Br. p. 19), so is the speed of the vehicle on the highway. If he were to travel by rail-

way to the portal, he would be subject to the laws governing the conduct of passengers on trains and enforced by the conductor. There is no essential or thoroughgoing difference between surrender of liberty of action on the highway, railway and mantrip. All three are imposed by the public authorities with a view to safety of travel. Neither is a test of work time under the act.

3. The Hazards of the Coal Mining Occupation are Irrelevant.

Respondent emphasizes the hazards of underground coal mining (Br. pp. 15, 24-6), but ignores the fact that **underground travel is not coal mining.** The dangers of underground travel are slight, as the District Court found (Petitioner's Br. pp. 27, 64). The hazards encountered at the working places, whether great or slight, are irrelevant.

4. This Court Did Not Intend the General Language Which It Used in the Muscoda Decision to Apply to the Present Case.

Respondent says that "we can assume . . . . . that this Court had in mind the Coal situation when it rendered the opinion in the ore case," and says that this Court used the general language quoted by the Circuit Court of Appeals and interpreted by it as dictating its decision, "with that (i. e. the coal situation) in mind" (Br. p. 17). Change of front is characteristic of respondent's case. The employees' position throughout the **Muscoda Case**, as presented by senior counsel for the Union here, was that "we are not trying the case of coal miners" (Pet. pp. 18, 70, 53 F. Supp. 935, 948). In the **Muscoda Case**, the iron ore miners objected to the admission of testimony relative to "the coal situation", and were sustained by the District Court. That ruling was approved by this Court which said that the District Court "properly

directed its attention solely to the evidence concerning petitioner's iron ore mines and disregarded the customs and contracts in the coal mining industry" (app. pet. p. 140). Having succeeded in its contention in the **Muscoda Case** that "the coal situation" should not be considered, counsel can hardly now be heard to argue that the general language of this Court in that decision was used with the present case "in mind."

5. The Union's Attempted Change of Front Puts All of the Equities Against It.

Respondent insisted, during the legislative consideration of the Act, and at all times thenceforward, to August, 1943, when the National War Labor Board disapproved the first Illinois Supplemental Agreement, that the contract definition of the working day met the requirements of the Act (pet. pp. 30-4, petitioner's br. pp. 44-6) — "we believe that your division should accept . . . the definition of working time . . . as complying both with the provisions of the Fair Labor Standards Act and of Interpretative Bulletin No. 13" (Houck Letter, app. pet. p. 53, 53 F. Supp. 941). Respondent considers this reversal of a long standing and strongly held position an "unimportant circumstance" (Br. p. 14), and says that petitioner does not "claim that the inconsistent position caused any loss or damage to petitioner" (Br. p. 15). Respondent, in making this statement, overlooked our discussion of this point (Pet. pp. 7-8, 37-39, petitioner's br. pp. 75-6). It is beyond understanding that respondent should attempt to deny that petitioner's reliance upon the concurring views of all parties concerned—the Union, the Administrator, the operators—as to the correct construction of the Act upon the present point, has resulted in accumulation of the immense potential liability with which petitioner would be confronted if the Union were to succeed in its present contention.

It is not to be overlooked in consideration of the equities of the case and of the shocking consequences which would result if the Union should be sustained, that the Union has nowhere in its brief sought to explain or excuse its change of front. The facts, and the inferences therefrom drawn by the District Court (app. p. 34), are conceded. They are dismissed with the single remark that they were "unimportant circumstances" (Br. p. 14). We do not believe that they will so impress the Court (pet. pp. 37-9). The position of the Respondents is thoroughly cynical. In sustaining it, the Circuit Court of Appeals has permitted a most flagrant violation of that recognized maxim of justice and fair play—'he who remains silent when he ought to have spoken will not be heard to speak when he should remain silent'.

6. O'Neill's Testimony Was Not "Impeached."

Respondent states that "we thought it sufficient impeachment of Mr. O'Neill to show that he himself had offered contracts to the United Mine workers which contained provisions for the payment of travel time" (Br. p. 18). Respondent here repeats its argument which was discussed in petitioner's brief (p. 73-4) that because the industry can operate successfully under wartime conditions of absence of competition, it can do the same under normal conditions of highly competitive operation. O'Neill in his testimony made it perfectly plain that he, like the Houck Letter, was referring to conditions of normal competition in the industry, conditions which had preceded the war and which he expeected to follow it (petitioner's br. p. 52).

Respondent, in referring to the draft agreements submitted by O'Neill's group (br. p. 18), does not mention that the circumstances were those of the Summer and Fall of 1943 when the government was in possession of the mines and the

ceiling price was high enough to permit profitable operation on a portal-to-portal basis (petitioner's br. pp. 48-9, 73-4).

Petitioner also does not mention the fact that the first draft referred to provides for a flat wage increase to all employees, whether working underground or not, "to prevent inequities and inequalities, to retain proper relation of wages to cost, and to maintain proper and existing competitive factors, marketing methods, rates **and other factors customary and inherent in the industry**" (Ex. C, R. 339, 814). The purpose of this agreement obviously was to preserve the contract definition and was the precise opposite of a portal-to-portal basis. Exhibit D. (R. 341, 816) was proposed after the Ickes-Lewis agreement had been made and placed in effect, and this draft amounted merely to a modified adoption of the Ickes-Lewis agreement. Exhibit F (R. p. 345, 826) is a draft adoption of the Ickes-Lewis agreement and is substantially the same in effect as the agreement of December 17, 1943, which was actually executed (petitioner's br. p. 49).

There is nothing in any of these drafts which can justly be said to "impeach" or in any way weaken O'Neill's testimony.

7. The Memorandum Filed In The Present Case By The Solicitor General Does Not Alter The Effect Of The Administrator's Ruling.

The Solicitor General has filed a memorandum since the filing of petitioner's brief stating that "the Circuit Court of Appeals correctly concluded that this court's decision in (the Muscoda Case) cannot be distinguished in principle from the case at bar" (Memo. pp. 1-2). The memorandum amounts to no more than a legal interpretation of the effect of the Muscoda decision. The legal interpretation had already been made by the Circuit Court of Appeals and the endorsement of the decision of the Circuit Court of Appeals by the Administrator

through the Solicitor General adds nothing to the material previously before the court. This eleventh hour change of front on the part of the Administrator is not claimed to be based upon any re-examination of the facts of underground mining, but merely upon the supposed effect of the Muscoda Case.

The Administrator erroneously states that "for more than a year now * * * the bituminous coal mines have been operating under contracts providing for payment of wages on the portal-to-portal basis". As pointed out in petitioner's brief (p. 47), the Ickes-Lewis Agreement is very far from providing a compliance with the Act upon a portal-to-portal basis. All underground employees receive pay for a uniform amount of assumed travel time, namely forty-five minutes per day, and not the actual travel time of each worker as would be required if respondent's contention is sustained. But they are not paid for this assumed amount of travel time at their "regular rate", but "at a special rate equivalent to two-thirds of the established regular hourly rate for the assumed forty-five minutes of travel time in each day" (Ex. H, R. 346, 834-5).

Respectfully submitted,

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a Corporation,

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vs.

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Respondents.

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BRIEF OF COUNSEL FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. JURISDICTION

The jurisdiction of this Court under Section 240 A of the Judicial Code, 28 U.S.C.A. 347, as amended by the Act of February 13, 1925, is not disputed.

II. STATEMENT OF THE MATTER INVOLVED

The fundamental and basic question involved in this case is whether or not travel time in coal mines is worktime under the provisions of Section 7 of the Fair Labor Standards Act of 1938.

III. SUMMARY STATEMENT OF THE FACTS

The petition for certiorari does not, in our judgment give an adequate presentation of the facts involved.

We have not been able to find any dispute in the evidence as to a single essential feature of the mining operations. The plaintiff operated Jewell Ridge and Jewell Valley coal mines in the Western District of Virginia employing 500 and 400 men respectively. At Jewell Ridge when the coal is mined out under one ridge the operation follows the seam into the next ridge so that the track on which the coal is hauled to the tipple comes out of the openings in passing from ridge to ridge. These openings make convenient places of entry for some seventy-two miners who live on top of the ridges and have poor and at times impassable roads from their houses to the main portal. All other miners at Jewell Ridge and all miners at Jewell Valley enter at the mouth of the mine. Those who live in company houses walk or ride to the mine mouth as they please. Those who live a great distance are hauled free to the mine mouth in busses furnished by the company or make their own transportation arrangements.

Each underground employee carries with him into the mine his dinner and his supply of drinking water for the day. The mines have no water system. Each underground employee is required to carry an individual lamp to light

his way or place in the mine. The lamps are electric battery lamps and the batteries weigh about five pounds. The light is fastened to the miner's cap and the battery to his belt.

The first thing all underground employees do upon arrival at the mine mouth is to get their lamps and batteries from the lamp house nearby. They then engage in various activities dependent upon their classification, before entering the mine.

(*a*) *Machinemen.*

Those machinemen who have motors, first get their motors out of the yard and switch them to the sand house where they fill four sand boxes holding approximately two bushels of sand, and oil the motors. They get two gallons of oil from the oil house, approximately 50 pounds of machine bits from the blacksmith shop, and such other equipment as may be necessary, including at times, rope, fingers for the starting box, and jack pipes. Those who have motors, load these supplies and equipment on to their motors. Those machinemen who do not take motors into the mine ride mantrips and load their supplies and equipment on to the tool car of the mantrip on which they ride.

(*b*) *Motormen and Brakemen.*

Motormen and brakemen go through the same process of getting oil and sand for their motors as that followed by the machinemen. Motors are brought out of the mine at the end of each shift for the purpose of being sanded, oiled and occasionally repaired.

(c) *Trackmen.*

Trackmen get from the blacksmith shop such tools as they may have brought out for repair. If bolts and spikes are needed, they get them in kegs weighing approximately 200 pounds and load them into the tool car on the mantrip on which they ride. Some of the trackmen take in steel cross-ties and, once or twice a month, a number of angle bars.

(d) *Bratticemen.*

Bratticemen carry from the supply house to the tool car on the mantrip eight or nine pounds of nails, and as needed, cement, bolts, wrenches, plaster, and rolls of brattice cloth. The latter weigh between 60 and 100 pounds.

(e) *Wiremen.*

Wiremen load on to the tool car each day their usual small tools, Stillson wrenches, hammers, chain blocks, "comealongs", wire splicers, drills, hack saws, hatchets, braces and bits, clip wrenches, and bell wrenches. Copper wire in lengths of 100 feet or more, blow torches and solder are taken in as needed.

(f) *Coal Loaders.*

The coal loaders, constituting the most numerous class of underground employees, take from the blacksmith's shop to the tool car, some four or five times a month such of their working tools as they may have brought out of the mine for repairs. Their tools consist of picks, shovels, augers, breast plates, tamping bars, wedges, axes and saws.

(g) *Services Continue in Transit.*

Each employee follows through to its destination, whatever he may have loaded into a tool car or on to a motor. When the tool car reaches its terminus the employee sees that his tools, equipment and supplies are unloaded and, in most instances, carries them himself to the place at which they are to be used.

THE UNDERGROUND JOURNEY.

The distances from the main portal or drift mouth to the rooms in which the coal is mined are so great that the use of mantrips to haul the men to mantrip stations is necessary to the successful operation of the mines. At Jewell Ridge, the distances from the portal to the various mantrip stations range from 4250 feet to 25,460 feet. At Jewell Valley the distances vary from 4600 to 14,450 feet. The mantrips are made up of coal cars used for hauling coal out of the mines, and are pulled by electric motors.

The mantrips are organized, operated and supervised by the company (R-225-226). They run on schedules fixed by the company (R-225.) They move out on the order of company dispatchers. A foreman rides each mantrip. The men are under the control of this company foreman. He sometimes gives work instructions during the ride. He sees to it that the men sit on the side of the car away from the trolley wire. No more than seven men are allowed to ride on a car. A separate tool car is provided on each mantrip. No man is allowed to carry any tool into the car with him. The rules of the company adopted in conformity with the mining laws of the State of Virginia contain eleven separate safety rules relating to mantrips, five of

which deal with the conduct of the men while on the mantrips (R-493-494). Failure to observe a rule carries a warning for the first offense, two days' layoff for the second offense and five days' layoff or discharge for the third offense (R-494).

If a man misses a mantrip, the company always provides some means for him to get to work (R-227). Furthermore, no walkways are provided along the main haulageways. The track in those haulageways is cluttered with coal.

UNDERGROUND HAZARDS.

The coal seams in the two mines vary in thickness from 32 to 54 inches. In some places the cross-collars supporting the roof are so low they scrape the coal off the cars as they are being hauled out. In places the men could ride or walk erect but, for the greater part of the ride, they sit bent over or stooped, and after leaving the main haulageways they must, in places, bend far over or else get down on the mourner's bench of the coal car in order to avoid injuries from contact with the roof. They run the risk of falling rock or slate, of broken trolley wires, and of wrecks occurring on the mantrip.

Coal mining is a hazardous occupation (R-164). There is a greater hazard in working underground than outside (R-165). The overall picture of the dangers and the necessity for unceasing vigilance is graphically portrayed in the language of the State Mine Inspector of Virginia (R-499-503) and of the witness Tetlow (R-325-326; 359-361). Statistics for the year 1941 show that approximately one man out of every ten engaged in coal mining in the United States was injured during that year (R-333).

The District Judge found that, in view of those statistics, injuries in plaintiff's mines on mantrips were surprisingly few in number and extent. The evidence disclosed that two men had been killed, one man had received a broken back, another had received injuries to his back, while another had his ribs broken; one man had been burned by a broken trolley wire while riding a gathering motor, and four other men had received injuries. The Company kept no record of injuries unless the accident was compensable, i. e., the workman lost seven days from his work.

After leaving the mantrip at the mantrip stations, the coal loaders in Jewell Ridge pick up the powder they will need for the day, get such tools as they brought in from the outside, and carry the tools, powder, lamp, and their drinking water for the day, as they walk to their usual working places.

The distances walked vary from about 500 feet to about 1500 feet. The roof is lower than it is in the haulageways, and the workmen must walk in many places in a stooped position or all bent over (R-372). In places, the back of a man scrapes the roof as he walks and thereby wears out the top of his jacket (R-462). When a man learns to walk in that low coal, he walks with his hands as much as his feet. (R-270)

While walking in the mines, the men must be on the alert to avoid injuries from tram trips catching them in narrow places. They must also avoid contact with the exposed trolley wire. Because of this danger, a rule of the company forbids the men to carry tools on their shoulders.

The exit from the mines at the end of the shift is substantially a reverse process of the entrance into the mines.

They bring to the powder station unused powder, and such tools as need repair.

The mantrips at Jewell Ridge start running at seven a..m. and follow one another not closer than 500 feet. Pay time starts at eight o'clock. At Jewell Valley the mantrip starts at seven thirty a. m. and pay time starts there at eight o'clock.

DECISION OF THE DISTRICT JUDGE.

The District Judge did not make any finding of facts contrary to the facts above enumerated. His findings include general statements, such as the following "Employees leave the trains at the 'mantrip stations' which are nearest to their respective places of work, and walk the rest of the way."

"After securing their lamps, various men do various things before taking the mantrip. ..... These preliminary activities require variously from three to ten minutes."

CUSTOM, COLLECTIVE BARGAINING, AND ADMINISTRATIVE RULING.

The District Judge devotes more than half of his findings of fact to a discussion of these three subjects which are concerned with "face to face" method of computation. His findings omit mention of the second Illinois Agreement (Pl. Ex. #40-R. 779-785), and the Ickes-Lewis Agreement of November 3, 1943 (Pl. Ex. #41 - R. 793-795). These two agreements recognize that coal miners are entitled to pay from portal to portal. It is also clear that during the time in question, April 1, 1943 to June 20, 1943,

the miners were working pursuant to a telegram from the President of the United States (Pl.-Ex. #29 R-708), in the expectation that any contract obtained would be retroactive to April 1, 1943.

It is not in the record, but it is a matter of common knowledge, and worthy of mention here, that on December 17, 1943, the International Union, United Mine Workers of America entered into a contract with the operators producing approximately seventy per cent of the coal tonnage of America, it which it was recognized that the miners were entitled to pay from portal to portal.

ARGUMENT

We respectfully submit that the majority opinion of this Court in the case of *Tennessee Coal, Iron & Railroad Company v. Muscoda Local #123, et al,* 321 U.S. 590, gives a decisive and controlling answer to all the arguments advanced by petitioner. The language of Judge Parker in the instant case, gives, we submit, an accurate interpretation of that opinion. We quote his language:

> "That the decision of the Court was understood by the Court itself to be based upon the underlying facts of the case and not merely upon the interpretation which the lower courts had placed upon those facts, is shown by the concurring opinions, which stressed the interpretation made in the findings of the lower courts. If the interpretation of the facts in these findings had been the controlling consideration in the majority opinion, there would, of course, have been no occasion whatever for the concurring opinions. Furthermore, where the facts of two cases are substantially the same, the law should not be applied differently because trial judges have

looked at them in a different way. The record shows that travel in an iron mine is the same sort of thing as travel in a coal mine. The findings of the trial courts as to whether upon the basic facts travel time was part of the work week within the meaning of the statute were mere conclusions involving mixed questions of law and fact; and, the basic facts being the same, an appellate court cannot distinguish cases on the basis of such conclusions. In such case, the difference in conclusions involving mixed questions of law and fact is necessarily attributable to a difference in views as to the law or its application.

"Equally vain is the attempt to distinguish the Supreme Court's decision on the ground that no such custom or bargaining agreements existed in the case of the mining of ore as are shown in the case before us. The Supreme Court decided the point on two grounds: (1) that the custom and agreements relied on where not sufficiently shown and (2) that they were immaterial in any event."

Petitioner argues the economic effects in vain under the undisputed facts of common knowledge. It is a matter of common knowledge that the majority of the coal operators throughout America have gone upon a portal-to-portal basis. We believe it is also a matter of common knowledge that the operators went upon this basis without waiting for any price adjustments.

The opinion of the U. S. Circuit Court of Appeals for the Fourth Circuit clears up the misunderstanding of the facts and the law manifested by the District Judge. There is no occasion for this Court to express itself again.

Wherefore, we respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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This_____day of_____, 1944.

CRAMPTON HARRIS

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Respondents.

BRIEF OF RESPONDENTS

I. Statement of the Case

Jewell Ridge Coal Corporation brought suit for declaratory judgment against two local unions, District No. 28, and the International Union of United Mine Workers of America and an officer or officers and a member or members of each. (R. 2).

The defendants filed an answer and counter claim for the underground employees. (R. 18).

On stipulation of the parties, a pretrial order was entered by the Court, Sections 12 and 13 of which read as follows:

"(12) It is further stipulated and agreed by all parties, by counsel, that the issues to be tried in this action are as follows:

a. What constitutes the working time which makes up the work week of plaintiff's underground employees within the meaning of Section 7 of the Fair Labor Standards Act of 1938, and what amounts, if any, are due and unpaid to such employees under said Section, the determination of such amounts, if any, to be later referred to a special master:

(1) In reference to "a" above, the plaintiff contends that such work week does not include that portion of the time spent by its underground employees in being transported or walking to and from their usual working places.

(2) In reference to "a" above, the defendants contend that such work week includes all the time from the time such employees are required to report and do report for work at the portal of the mine until they return to the portal at the end of the shift, less the regular lunch period when they are relieve of all duties.

"(13) It is further stipulated and agreed that:

a. Plaintiff is a corporation organized under the laws of the State of Virginia and was incorporated prior to October 24, 1938, and

b. That this is a class action binding upon and inuring to the benefit of all plaintiff's underground employees." (R. 32).

The District Court rendered judgment on January 25, 1944, in which the Judge ordered and declared as follows:

"(1) That the Fair Labor Standards Act of 1938 does not require that there be included within the work week of underground workers in plaintiff's mines, either time spent by such employees outside the portal of the mines before entering therein, or time spent in traveling from the portals to their usual places of work and return; and

"(2) That plaintiff, in computing the work week of its underground employees on the basim of hours of work in the mines at their usual working places, exclusive of the lunch period, and the time spent outside the portals, and travel time from the portals to their usual working places and return, as provided in the effective wage agreements and continuations thereof, and in paying its underground workers for their services on that basis, has complied with and discharged all its obligations imposed upon it by the (fol. 773) Fair Fair Labor Standards Act of 1938.

"And all the objects of this action having been accomplished, defendants being entitled to recover nothing on their counter-claim, it is ordered that the same be, and it hereby is, dismissed at the costs of the defendants; to all of which action of the Court in declaring the rights of the parties contrary to their contentions, and in dismissing this action at their costs, the defendants, by counsel, duly objected and excepted upon reasons fully stated to the Court." (R. pages 578 and 579)

The findings of fact and conclusions of law of the District Court are set up beginning with page 542 to 571, both inclusive, of the Record. It is reported in 53 Fed. Supp. 935.

The Circuit Court of Appeals for the 4th Circuit reversed the judgment of the District Court, Judge Soper dissenting. 145 Fed. (2) 10.

This Court granted certiorari on petition of Jewell Ridge Coal Corporation.

II. Jurisdiction

This Court has jurisdiction based on Section 240(a) of the Judicial Code, 28 U. S. C. A. 347, as amended by the Act of February 13, 1925. We do not concede the grounds upon which jurisdiction has been invoked by the petitioner in this particular case.

III. Statement of the Matter Involved

The fundamental question in this case is whether or not travel time in coal mines is work time under the provisions of Section 7 of the Fair Labor Standards Act of 1938. Counsel for petitioner also raise the question of whether underground workers in coal mines are to be denied the benefits of Section 7 of the Fair Labor Standards Act because of (a) Long continued custom not to pay for travel time; (b) The claimed existence of contracts upon a face-to-face basis; (c) A claimed intention of Congress to except the coal industry from the provisions of the Act.

IV. Summary Statement of the Facts

The statement of facts made by petitioner does not convey to the reader a precise and complete picture of the two mining operations of the Jewell Ridge Coal Corporation. After reading it one would have the impression that the underground employees could wander into the mine afoot or ride mantrips according to their whim of the moment. Such is not the case at all.

At the mine named Jewell Valley, all underground employees must report at the mine mouth and ride mantrips or machines which they operate themselves, into the mine. At the mine named Jewell Ridge, there are physical peculiarities which make it necessary for 72 employees to enter

the mine at openings other than the mine mouth. These 72 employees live on hills or mountains remote from the mine portal. The roads from their homes to the mine portal are not improved. They become impassable. But the mine track follows the level coal seam out of one hill or mountain and into another at a number of different places. These openings are convenient entrances and exists for the 72 who otherwise could not get into the mine. (R. 213.)

All the other underground employees at this mine report at the main portal. (R. 213.) They ride mantrips, unless they are machine or motor operators who have to take in their machines. (R. 277, 279, 281.)

Those employees who live in company houses walk or ride to the mine mouth as they please. Those who live at a great distance are hauled free to the mine mouth in busses furnished by the company, or make their own transportation arrangements. (R. 244.)

Each underground employee carries with him into the mine his dinner and his supply of drinking water for the day. (R. 372.) The mines have no water system. Each underground employee is required to carry an individual lamp to light his way or place in the mine. (R. 221.) The lamps are electric battery lamps and the batteries weigh about five pounds. (R. 219.) The light is fastened to the miner's cap and the battery to his belt. (R. 223.)

The first thing all underground employees do upon arrival at the mine mouth is to get their lamps and batteries from the lamp house nearby. (R. 367.) They then engage in various activities dependent upon their classification, before entering the mine.

(*a*) *Machinemen*

Those machinemen who have motors, first get their motors out of the yard and switch them to the sand house where they fill four sand boxes holding approximately two

bushels of sand, and oil the motors. They get two gallons of oil from the oil house, approximately 50 pounds of machine bits from the blacksmith shop, and such other equipment as may be necessary, including at times, rope, fingers for the starting box, and jack pipes. Those who have motors, load these supplies and equipment on to their motors. Those machinemen who do not take motors into the mine ride mantrips and load their supplies and equipment on to the tool car of the mantrip on which they ride. (R. 401-402.)

(*b*) *Motormen and Brakemen*

Motormen and brakemen go through the same process of getting oil and sand for their motors as that followed by the machinemen. Motors are brought out of the mine at the end of each shift for the purpose of being sanded, oiled and occasionally repaired. (R. 477-478.)

(*c*) *Trackmen*

Trackmen get from the blacksmith shop such tools as they may have brought out for repair. If bolts and spikes are needed, they get them in kegs weighing approximately 200 pounds and load them into the tool car on the mantrip on which they ride. (R. 441-2.) Some of the trackmen take in steel cross-ties and, once or twice a month, a number of angle bars. (R. 442.)

(*d*) *Bratticemen*

Bratticemen carry from the supply house to the tool car on the mantrip eight or nine pounds of nails, and as needed, cement, bolts, wrenches, plaster, and rolls of brattice cloth. (R. 432.) The latter weigh between 60 and 100 pounds. (R. 434.)

(e) *Wiremen*

Wiremen load on to the tool car each day their usual small tools, Stillson wrenches, hammers, chain blocks, "comealongs," wire splicers, drills, hack saws, hatchets, braces and bits, clip wrenches, and bell wrenches. (R. 451.) Copper wire in lengths of 100 feet or more, blow torches and solder are taken in as needed. (R. 453.)

(f) *Coal Loaders*

The coal loaders, constituting the most numerous class of underground employees, take from the blacksmith's shop to the tool car, some four or five times a month such of their working tools as they may have brought out of the mine for repairs. Their tools consist of picks, shovels, augers, breast plates, tamping bars, wedges, axes and saws. (R. 367, 385, 396, 459.)

(g) *Services Continue in Transit*

Each employee follows through to its destination, whatever he may have loaded into a tool car or on to a motor. (R. 235.) When the tool car reaches its terminus the employee sees that his tools, equipment and supplies are unloaded and, in most instances, carries them himself to the place at which they are to be used. (R. 371.)

The Underground Journey

The distances from the main portal or drift mouth to the rooms in which the coal is mined are so great that the use of mantrips to haul the men to mantrip stations is necessary to the successful operation of the mines. At Jewell Ridge, the distances from the portal to the various mantrip stations range from 4,250 feet to 25,460 feet. (R. 115-632.) At Jewell Valley the distances vary from 2,600 to 14,450

feet. (R. 211-704.) The mantrips are made up of coal cars used for hauling coal out of the mines, and are pulled by electric motors. (R. 229.)

The mantrips are organized, operated and supervised by the company. (R. 225-226.) They run on schedules fixed by the company. (R. 225.) They move out on the order of company dispatchers. (R. 225.) A foreman rides each mantrip. The men are under the control of this company foreman. (R. 226.) He sometimes gives work instructions during the ride. (R. 379, 381-2, 396, 468, 474.) He sees to it that the men sit on the side of the car away from the trolley wire. (R. 370, 382.) No more than seven men are allowed to ride on a car. (R. 370.) A separate tool car is provided on each mantrip. (R. 226.) No man is allowed to carry any tool into the car with him. (R. 226.) The rules of the company adopted in conformity with the mining laws of the State of Virginia contain eleven separate safety rules relating to mantrips, five of which deal with the conduct of the men while on the mantrips. (R. 493-494.) Failure to observe a rule carries a warning for the first offense, two days' layoff for the second offense and five days' layoff or discharge for the third offense. (R. 494.)

If a man misses a mantrip, the company always provides some means for him to get to work. (R. 227.) Furthermore, no walkways are provided along the main haulageways. (R. 69, 393-4.) The track in those haulageways is cluttered with coal. (R. 437, 446.)

Underground Hazards

The coal seams in the two mines vary in thickness from 32 to 54 inches. (R. 84.) In some places the cross-collars supporting the roof are so low they scrape the coal off the cars as they are being hauled out. (R. 485.) In places the men could ride or walk erect but, for the greater part of the

ride, they sit bent over or stooped, and after leaving the main haulageways they must, in places, bend far over or else get down on the mourner's bench of the coal car in order to avoid injuries from contact with the roof. (R. 474.) They run the risk of falling rock or slate, of broken trolley wires, and of wrecks occurring on the mantrip. (R. 470, 377, 397, 378, 334, 446.)

Coal mining is a hazardous occupation. (R. 164.) There is a greater hazard in working underground than outside. (R. 165.) The overall picture of the dangers and the necessity for unceasing vigilance is graphically portrayed in the language of the State Mine Inspector of Virginia (R. 499-503) and of the witness Tetlow (R. 325-326; 359-361). Statistics for the year 1941 show that approximately one man out of every ten engaged in coal mining in the United States was injured during that year (R. 333).

The District Judge found that, in view of those statistics, injuries in plaintiff's mines on mantrips were surprisingly few in number and extent. The evidence disclosed that two men had been killed (R. 384), another had received injuries to his back (R. 378), while another had his ribs broken (R. 378); one man had been burned by a broken trolley wire while riding a gathering motor (R. 392), and four other men had received injuries. (R. 397, 461.) The Company kept no record of injuries unless the accident was compensable, i. e., the workman lost seven days from his work. (R. 529, 527.)

After leaving the mantrip at the mantrip stations, the coal loaders in Jewell Ridge pick up the powder they will need for the day, get such tools as they brought in from the outside, and carry the tools, powder, lamp, and their drinking water for the day, as they walk to their usual working places. (R. 371-372.)

The distances walked vary from about 500 feet to about 1,500 feet. The roof is lower than it is in the haulageways,

and the workmen must walk in many places in a stooped position or all bent over (R. 372). In places, the back of a man scrapes the roof as he walks and thereby wears out the top of his jacket (R. 462). When a man learns to walk in that low coal, he walks with his hands as much as his feet. (R. 270.)

While walking in the mines, the men must be on the alert to avoid injuries from tram trips catching them in narrow places. (R. 388, 447.) They must also avoid contact with the exposed trolley wire. Because of this danger, a rule of the company forbids the men to carry tools on their shoulders. (R. 852.)

The exit from the mines at the end of the shift is substantially a reverse process of the entrance into the mines (R. 375). They bring to the powder station unused powder (R. 271), and such tools as need repair (R. 376, 271).

The mantrips at Jewell Ridge start running at seven a. m. (R. 227) and follow one another not closer than 500 feet (R. 225). Pay time starts at eight o'clock (R. 227). At Jewell Valley the mantrip starts at seven thirty a. m. and pay time starts there at eight o'clock (R. 464).

We have not been able to find any dispute in the evidence as to a single essential feature of the mining operations.

Decision of the District Judge

The District Judge did not make any finding of facts contrary to the facts above enumerated. His findings include general statements, such as the following "Employees leave the trains at the 'mantrip stations' which are nearest to their respective places of work, and walk the rest of the way" (R. 545).

"After securing their lamps, various men do various things before taking the mantrip (R. 546). These preliminary activities require variously from three to ten minutes" (A. 546).

V. Summary of the Argument

1. The law is clear. Section 7 of the Fair Labor Standards Act of 1938 provides that no employer shall employ any of his employees, who is engaged in commerce or in the production of goods for commerce, for a work week longer than the stated number of hours, unless such employee receives compensation for his employment in excess of the stated hours at a rate not less than one and one-half times the regular rate at which he is employed. Employ is defined, "Includes to suffer or permit to work."

If the employee works more than the stated hours he must be paid for the excess time at rate and one half. No opening is left whereby the employer may avoid the required payment.

2. The law which petitioner seeks to have construed is not a law appearing in any Act of Congress. The argument of counsel for petitioner is in effect an invitation to judicial legislation.

3. The underground employees of the petitioners were at work from the time they were required to report and did report for work at the portal of the mine until they returned to the portal of the mine at the end of the shift, less the regular lunch period when they were relieved of all duties. This working time comprised the work-week. At the time the employees reported at the portal they had surrendered their will to the will of the master. They were then and there subject to his direction, supervision and control. They were expending energy in his behalf to accomplish his purposes in mining coal. They were not engaged in recreation or pleasure. The things that they were doing were absolutely necessary to the production of coal. Those things required effort and alertness. They subjected the workmen to fatigue and serious dangers.

4. The decision of this Court in *Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local No. 123, et al.*, 321 U. S. 590 is controlling and was correctly followed by the Circuit Court of Appeals for the 4th Circuit in its opinion.

5. Neither custom nor contract can avail to nullify the express provisions of the Fair Labor Standards Act of 1938.

Argument

In the first opinion of the Circuit Court of Appeals for the 5th Circuit in the case of *Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local No. 123, et al.*, 135 Fed. 2nd 320, Circuit Judge Holmes used this language:

> "Whatever may be said as to inferences from the facts, the law of this case is not doubtful" (Page 322).

We are unable to see any language in the Act itself creating any doubt as to the intention of Congress. The law is stated in language that is simple and easy to understand so far as the present status of this case is concerned. We are not, as yet, confronted with any problems arising from the phrase "rate of employment". The possibility of figuring out different formulae to apply in order to get the regular rate of employment does not obtain with reference to the statutory duty to pay one and one-half times that regular rate, whatever it may be, for all hours in excess of those prescribed by the Act. The law which petitioner seeks to have construed by this Court would, in our judgment, read as follows:

"Unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed"; provided, however, that this law shall not apply wherever there has been a custom to pay

men for a part only of their work, and; provided further, that this law shall not apply wherever the employees have had a contract by which they were paid for less than all their hours of work; and provided further, that the employees have never unsuccessfully asked to be paid for all their hours of work; and provided further, that the act shall under no circumstances apply to those engaged in the business of mining coal, anywhere in the United States.

Congress did not add the provisos above set forth to the law which it enacted. The language of the Congressional Act applies with a direct and powerful brevity to every type of business in the United States in which employer and employee were engaged in interstate commerce or the production of goods for interstate commerce except those specifically exempted.

As we read the brief of petitioner's counsel, they attribute importance to the following unimportant circumstances:

(a) Mr. Lewis did not expect the bill to affect the coal industry.

(b) Mr. Lewis did not believe that the Act would outlaw the face-to-face definition and make mandatory the portal-to-portal basis.

(c) Mr. Lewis did not desire the Act to affect the coal industry.

(d) The position of Mr. Lewis in the wage negotiations was not consistent with his demand for the benefits of the law.

(e) The mine workers refrained throughout the 1943 wage conference from asking all the benefits to which they were entitled under the Fair Labor Standards Act.

Is it not clear at a glance that there is no substance to any of these contentions. The hope or expectancy or desire or

demands or failure to make demands of those affected by an Act of Congress are of no legal consequence. Inclusion within a law of the United States is not a matter of voluntary assent or of psychological attitudes.

The claim made by the respondents in this case was for the 8 pay periods from April 1 to June 20, 1943. They made that claim within five months. The penalty for refraining too long is the statute of limitations or the doctrine of laches. The applicable Virginia statute of limitations is three years; it is not five months.

VI. Consistency

The argument on consistency, sub-division 10 on page 37 of the brief of the petitioner, lacks one important element. Apparently petitioner is trying to set up some sort of estoppel. He gives but one-half of an estoppel in charging inconsistency. The other equally vital half is action in reliance thereon by petitioner. Nowhere does petitioner claim that the inconsistent position caused any loss or damage to petitioner.

VII. Dangers to Underground Workmen

We have set up in appendices 2, 3 and 4 Governmental reports which show beyond the peradventure of a doubt whether coal mining is dangerous. Mr. Charles O'Neill testified that it was a hazardous occupation (R. 164). If coal mining was not dangerous and if travel along the haulage ways was not dangerous, why did the law of the State of Virginia or Jewell Ridge Coal Corporation require so many safety measures? If travel was not dangerous, why such remarkably slow speed for mantrips as 6 miles per hour in this age of rapid locomotion? State law prescribed that every mantrip should have a tool car. If riding on the mantrips involved no more danger than riding in an auto-

mobile, why couldn't a miner have his pick or his shovel in the car with him?

Respondent's Exhibit No. 1, page 841 of the Record, introduced at R. 493, has special rules for the safety and operation of mines. Eight of those rules deal with mantrips (Rules 29 through 36, pages 849 and 850 of the Record).

The facts heretofore detailed show that the Jewell Ridge Coal Corporation supervised the mantrips (R. 225, 226, 228). Counsel for the petitioner argue that such supervision was for safety and was required by law. Could there be a clearer illustration of the fact that travel on the mantrips is dangerous than the existence of laws requiring special precautions to be taken with reference to mantrips? Furthermore, we respectfully submit that the motive which prompts an employer to supervise the travel of his employees is of no importance. It is the fact of supervision which puts the employee under the direction and control of the employer. It is the fact of supervision which gives an important factor in solving the problem of whether the employee is at work. Whether the employer exercised supervision to escape damage suits or to avoid the payment of high insurance premiums to an insurance carrier, or whether he exercised supervision because the law required him to exercise it, appear to us to be of no moment whatsoever.

VIII. Custom and Collective Bargaining Contracts

The position taken by counsel for petitioner with reference to custom and collective bargaining bear a striking similarity to the position taken by counsel for the Tennessee Coal, Iron & Railroad Company in this Court in that case. The brief of Gov. Miller and Mr. Burr was not limited to the operation of ore mines. Gov. Miller and Mr. Burr argued before this Court the coal situation. They attached the

Houck letter as an appendix to their brief and also the opinions of Chairman Davis and member Morse of the National War Labor Board. We can assume, therefore, that this Court had in mind the coal situation when it rendered the opinion in the ore case. With that in mind, Mr. Justice Murphy used this language:

> "But in any event it is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the workweek or not to compensate employees for certain portions of their work. The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him for only a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." (p. 602)

It is interesting to observe that counsel for petitioner praise Mr. Charles O'Neill and attach importance to his testimony that chaos would result if the portal-to-portal method of computing miners wages should be adopted. We thought it sufficient impeachment of Mr. O'Neill to show that he himself had offered contracts to the United Mine Workers which contained provisions for the payment of travel time. It seemed very queer that he should tell the Court that chaos would result when he himself was the sponsor on more than one occasion of the very thing which he condemned. In fact, the day before Mr. O'Neill took the stand as a witness in this case, his committee offered still another portal-to-portal contract to the U. M. W. A.

Mr. O'Neill's proposed contract dated June 14, 1943 was introduced at page 339 of the Record and appears at page

813. The fourth draft dated September 12, 1943 was introduced by the respondents at page 341 of the Record and appears at page 816. The third tender of a contract by Mr. O'Neill, the day before he appeared as a witness, appears as defendant's Exhibit F on page 826 of the Record, and was introduced at page 345. We respectfully submit that the contracts so tendered to the United Mine Workers of America by the witness O'Neill clearly reveal that what he was trying to do was very different from what he was testifying.

We concede, of course, that Mr. O'Neill is an important operator and, in fact, think that his testimony and the testimony of witness Tetlow give a graphic history of coal mining in the United States which is well worth reading in detail.

IX. Underground Travel in Respective Mines

On page 61 of their brief, counsel for petitioner set up four elements upon which they attempt to base a distinction between the underground travel in the two mines. The first element is supervision by the employer. Counsel attempts to escape the effects of supervision upon the theory that it was a safety measure. In fact, the Record shows that the mantrips were desired by the company (R. 69). They increased orderliness (R. 70). It is customary in the districts in which the mines are located to have mantrips (R. 71). The mantrips are scheduled by the company (R. 39 and 225). The mantrips are supervised as to speed (R. 164, 228). The mantrips are in charge of the section foreman who see to it that the men sit in the mancars on the opposite side from the trolley wire (R. 226). The foreman's connection with the mantrips is also mentioned on pages 369, 370, 381, 391 and 393 of the Record. In addition to supervision the foreman, while on the mantrips, some-

times gives instructions to the men (R. 396, 379, 381, 382, 468, 474). Mantrips are an advantage to both the company and the men (R. 40). If a man misses a mantrip, the company finds a way to get him in the mine (R. 227). Mantrips are necessary in order that the men may be in shape for work when they arrive at their working places (R. 258). It is not practical to operate the mines without mantrips (R. 259).

The second element upon which a distinction is sought to be based by counsel is "physical and mental exertion". This distinction fails because of the actual travel in the haulage ways. There are low places in which men riding in the mantrips have to be on guard in order to avoid getting their heads busted (R. 420). There is the hazard of wrecks (R. 388, 389, 377, 461, 470), of slate falls (R. 463). The manner in which the men sit in the mantrips is described at page 474 of the Record. This shows that men sit on the mourner's bench and have to duck over, and that this is true even in the main entrance. If the men rode on up to the working place they would have to get up off the mourner's bench or lie down in the car (R. 475).

The third element on which a distinction between travel in coal mines and travel in ore mines is attempted by petitioner's counsel consists of "activity necessary to be performed for the employer's benefit".

This element fails under the facts in the instant case. The men were carrying lamps and batteries for the employer's benefit, they were carrying drinking water for his benefit. On many occasions they carried tools, detonators and explosives. The travel from the portal to the face was an activity necessary to be performed for the employer's benefit. The coal couldn't be mined unless the men travelled from the portal to the face.

The fourth element is based upon conditions peculiar to the occupation of mining. Under this three sub-heads are

used: First, conditions replete with hazards. The man-trips in the coal mines were dangerous (R. 384, 334, 335, 420, 461, 463). Second, conditions required physical exertion and mental alertness, which we have already discussed. Third, conditions unpleasant and burdensome to those encountering them.

X. Conclusion

The petitioner seems to think that the equities of the case are in its favor. We cannot believe, for our own part, that the fact that men have labored for many years without full pay creates any equity which would require them to labor for the rest of their lives without getting full pay.

Counsel also make a point that no work was required of the employees between the portal and the face. The language of the statute is an answer to this. The statute covers a situation where the employee is "suffered or permitted" to work more than the prescribed period.

Counsel for petitioner valorously assumed to argue the case of the entire coal industry of America. The only questions before this Court are the questions affecting the operation of the Jewell Ridge mines.

If the overwhelming majority of the coal operators of America have settled their problems with the United Mine Workers of America, that settlement is not in issue in this cause. The Jewell Ridge Corporation did not settle. It preferred to go to court. If the petitioner-corporation feels that employees should be paid for all the years despite their disclaimer, we do not presume that they would find very many employees who would refuse the payment when it was offered them.

The suggestion that there was a contract for the period from April 1 to June 20 is hardly borne out by the facts. The entire coal problem arose because the United Mine Workers of America did not have a contract. The Presi-

dent of the Jewell Ridge Coal Corporation testified that the last contract he signed (supplemental agreement) was to the basic contract from April 1, 1941 to April 1, 1943 (R. 71). The contract argument, therefore, seems to us to be entirely beside the point.

Respectfully submitted,

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I hereby certify that I have mailed a copy of the foregoing brief and argument to Mr. William A. Stuart, Abingdon, Virginia; and Mr. George Richardson, Jr., 506 Commercial Bank Building, Bluefield, West Virginia.

This — day of February, 1945.

CRAMPTON HARRIS,
Counsel for Respondent.

APPENDIX 1

Statute Involved

The pertinent provisions of the Fair Labor Standards Act (Act of June 25, 1938, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201)) are as follows:

Sec. 3(g) "Employ" includes to suffer or permit to work.

Sec. 3(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Sec. 7(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

APPENDIX 2

Table 68—p. 100—Bulletin 462 Bureau of Mines U. S. Dept. of Interior. Coal Mine Accidents in the United States: 1942. For the years 1938-42.

TABLE 68.—*Number of fatalities and nonfatal injuries at coal mines in the United States for the years 1938–42*

Cause of accident	Bituminous				
	1938	1939	1940	1941	1942
Underground					
Falls of roof or face	10,548	10,604	11,853	12,452	13,224
Mine cars and locomotives	7,836	8,082	9,368	9,833	11,581
Explosions of gas or coal dust	143	95	206	150	114
Explosive	253	216	292	245	318
Electricity	540	574	755	737	931
Machinery (cutters, loaders, etc.)	2,738	3,081	3,722	4,457	4,911
Mine fires	9	8	7	18	14
Miscellaneous	11,561	12,098	13,402	14,256	17,105
Total underground	33,628	34,758	39,605	42,148	48,198
Shaft	64	64	91	70	69
Stripping or open-cut mining[1]	1,036	1,133	1,339	1,450	1,460
Surface:[2]					
Haulage	556	651	701	753	893
Machinery	210	251	363	320	345
Miscellaneous	1,300	1,687	1,895	1,896	2,228
Total surface	2,066	2,589	2,959	2,969	3,466
Grand total	36,794	38,544	43,994	46,637	53,193

APPENDIX 3

Table 3—page 6. Mineral Industry Surveys—U. S. Dept. of Interior Bureau of Mines. Coal Mine Fatalities CMF No. 150

TABLE 3.—*Deaths and fatality rates at coal mines in the United States 1942 and 1943, by causes of accidents*[1]

January–December 1942

Cause	Bituminous	
	Number killed	Killed per million short tons
Underground:		
Falls of roof and coal	622	1.073
Haulage	254	.438
Gas or dust explosions:		
Local	20	.034
Major	127	.219
Explosives	20	.034
Electricity	50	.087
Machinery	41	.071
Shaft	8	.014
Miscellaneous	33	.057
Total underground	1,175	2.027
Stripping or opencut	20	.034
Surface	59	.102
Grand total	1,254	2.163

[1] All figures are subject to revision.

APPENDIX 4

Table 3—page 6—Mineral Industry Surveys—U. S. Dept. of Interior Bureau of Mines—Coal Mine Fatalities CMF No. 162

TABLE 3.—*Deaths and fatality rates at coal mines in the United States 1943 and 1944, by causes of accidents*[1]

Cause	Bituminous	
	Number killed	Killed per million short tons
January–December 1943		
Underground:		
Falls of roof and coal	623	1.056
Haulage	235	.398
Gas or dust explosions:		
Local	22	.037
Major	148	.251
Explosives	28	.047
Electricity	31	.053
Machinery	27	.046
Shaft	8	.014
Miscellaneous	38	.064
Total underground	1,160	1.966
Stripping or opencut	24	.041
Surface	60	.101
Grand total	1,244	2.108
January–December 1944		
Underground:		
Falls of roof and coal	546	0.881
Haulage	227	.366
Gas or dust explosions:		
Local	11	.018
Major	22	.036
Explosives	17	.027
Electricity	33	.053
Machinery	40	.065
Shaft	4	.006
Miscellaneous	93	.150
Total underground	993	1.602
Stripping or opencut	30	.048
Surface	48	.077
Grand total	1,071	1.727

[1] All figures are subject to revision.

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 721

JEWELL RIDGE COAL CORPORATION, A CORPORATION, PETITIONER

v.

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, AN UNINCORPORATED ASSOCIATION, AFFILIATED WITH THE INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION AS AMICUS CURIAE

Because both petitioner and the District Court have relied substantially upon the past administrative action with respect to the issue involved in this case, we deem it appropriate to file this statement on behalf of the present Administrator.

While the administrative background on the question of underground travel in the bituminous coal industry differs from that in the iron ore industry, we believe that the Circuit Court of Appeals correctly concluded that this Court's

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decision in *Tennessee Coal, Iron and R. R. Co.* v. *Muscoda Local,* 321 U. S. 590, cannot be distinguished in principle from the case at bar. The majority opinion, as we read it, announces the principle that if the character of the activity as work or employment is clear, customs or agreements are immaterial and incapable of removing the activity from the scope of the Act.

Petitioner, and the opinion of the District Court below, seek to distinguish the two cases on the ground, *inter alia,* that the Administrator of the Wage and Hour Division has "found essential distinctions between the facts of the two respective industries in relation to underground travel" (Pet. p. 24). This reference is to the statements of enforcement policy made by former Administrator Philip B. Fleming in 1940 regarding underground travel in the bituminous coal and in the metal mines respectively. With respect to the bituminous coal industry, he announced that in carrying out his enforcement duties he "would accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the particular industry and are supported by a long history of bona fide collective bargaining," and that, in view of the prevailing customs and practices in the bituminous coal mining industry which were supported by a long history of bona fide collective bargaining, the

practice of computing working time on a "face to face" basis in that industry would not be regarded as unreasonable (Plfs. Ex. No. 21, R. 673, 675). With respect to metal mining, however, he announced that working time should be computed on a "portal to portal" basis since there was no comparable record in the metal mines either in regard to collective bargaining or in regard to uniformity of practices or customs (Plfs. Ex. 23, R. 692, 694).

At the time Administrator Fleming announced these policies there were in existence no authoritative court decisions establishing the legal principles which should control his interpretation. In distinguishing between the bituminous coal mining situation and the metal mining situation he was guided not by legal principles but by his reluctance to disturb prevailing practices which both the labor union and the operators were earnestly urging him to leave undisturbed. The majority opinion of this Court in the *Tennessee Coal* case, made it clear that the grounds on which Administrator Fleming drew his distinction were untenable in law in view of the character of underground travel as work. Moreover, at the present time, and for more than a year now, the administrative enforcement policy has not been supported by practice or contract, since the bituminous coal mines have been operating under

contracts providing for payment of wages on the "portal to portal" basis.

Apart from the facts relating to custom and contract, there is no basis for legal distinction between underground travel in the two industries. This is not a borderline case "where the other facts give rise to serious doubts as to whether certain activity or non-activity constitutes work or employment" (321 U. S. at 603). As the Circuit Court of Appeals pointed out, "the record leaves no doubt that travel to the working face in a coal mine is substantially the same sort of thing as travel to the working face in an iron mine" (R. 889). The underground travel in the bituminous coal mines, like that in the iron mines, is a "fossorial activity bearing all the indicia of hard labor" (321 U. S. at 599), and its character as work is no less clear in the former than in the latter mines. This is evident from the description of the underground travel in the findings of fact of the District Court in the instant case (R. 544–548), despite the District Judge's conclusory statement that "such painful and burdensome conditions as those described in the iron ore mines" were not found in petitioner's mines (R. 567). This conclusion, as the Circuit Court of Appeals accurately appraised it, does not mean that the basic facts of the two cases are substantially different but only that the "trial judges have looked

at them in a different way" (R. 891). The Circuit Court of Appeals correctly pointed out that the basic facts were the same and the District Judge's conclusion was simply attributable to a difference in views as to the law or its application (*ibid*).

Since, in the instant case the facts relating to underground travel, as in the case of the iron ore mines, "leave no uncertainty as to its character as work," custom and contract may not control the computation of working hours under the statute (See 321 U. S. at 602–603).

The District Court in the instant case emphasized the fact that the Administrator, although invited by plaintiff to intervene in this action, did not participate, nor did he retract or modify the ruling of former Administrator Fleming (R. 559). In the brief filed on behalf of the Administrator in the *Tennessee Coal, Iron & R. R. Co.* case, we pointed out that the inaction on the part of the present Administrator was "attributable, not to continued approval under present circumstances of the previously announced coal policy, but to his reluctance to do or say anything which might be construed as an attempt to influence the present litigation" (Br. p. 62). At the time this case was tried the *Tennessee Co.* case had not yet been decided by this Court.

In any event, the Government is of opinion that the decision of the Circuit Court of Appeals is correct.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

DOUGLAS B. MACGIS,
Solicitor of Labor.

JANUARY 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945

FILE COPY

IN THE

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v.

LOCAL No. 6167, UNITED MINE WORKERS OF AMERICA, an Unincorporated Association, Affiliated with the International Union, United Mine Workers of America, et al., *Respondents*.

BRIEF FOR SOUTHERN COAL PRODUCERS ASSOCIATION AMICUS CURIAE.

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BRIEF FOR SOUTHERN COAL PRODUCERS ASSOCIATION AMICUS CURIAE.

I. STATEMENT OF THE CASE.

This case is before the Court on writ of certiorari directed to the United States Circuit Court of Appeals, Fourth Circuit. That Court, in *Local No. 6167, United Mine Workers of America, etc. et al v. Jewell Ridge Coal Corporation*, held that underground travel time of bituminous coal miners from the portal of the mines to the usual working places and return to the portal constitutes time worked within the meaning of the Fair Labor Standards Act of

1938, and must be included within their work week for purposes of Section 7 of the statute.

In so ruling, the Circuit Court of Appeals reversed the decision of the United States District Court, District of Virginia, in *Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America, etc. et al*, which had ruled:

> "(1) That the Fair Labor Standards Act of 1938 does not require that there be included within the work week of underground workers in plaintiff's mines, either time spent by such employees outside the portal of the mines before entering therein, or time spent in traveling from the portals to their usual places of work and return.
>
> "(2) That plaintiff, in computing the work week of its underground employees on the basis of hours of work in the mines at their usual working places, exclusive of the lunch period, and the time spent outside the portals and travel time from the portals to their usual working places and return, as provided in the effective wage agreements and continuations thereof, and in paying its underground workers for their services on that basis, has complied with and discharged all its obligations imposed upon it by the Fair Labor Standards Act of 1938."

The decision of the Circuit Court of Appeals appears in 145 F. 2d, 10, and that of the District Court in 53 F. Supp. 935.

The Southern Coal Producers Association participated in the hearings before both the lower courts as *amicus curiae*, and files this brief because of the importance of the case to the bituminous coal mining industry.

We can best summarize the vital character of the question here before the Court by quoting the language employed by the National War Labor Board when the 1943 wage controversy between the United Mine Workers and the bituminous coal operators was presented to that agency. The Board then said:

"... the whole economic structure of the bituminous mining industry has been built upon the payment of wages on the 'face to face' basis. To now reconstruct the maximum hours and working time provisions applicable to bituminous coal mining, so as to cure the inequities due to different individual travel time, would create utter confusion in the economics and in the wage structure of the industry, which could only adjust itself to this new system over a period of years. The considerations involved in such a change, both economically and with reference to the fair treatment of the individual workers, are so complex that they could be satisfactorily worked out only by a long period of collective bargaining, if at all."

(R. 741)

The Southern Coal Producers Association is of the opinion that the Fair Labor Standards Act does not compel the abolition of the face-to-face method of computing work time, established many years prior to the enactment of that law in order to cope with operating difficulties inherent in the nature of coal mining. The Association believes that nothing in the language of the statute or the intention and purposes of the Congress in enacting it impose a mandate that the bituminous coal mining industry shall include travel time in computing hours of labor for employees entitled to the benefits of Section 7 of the Fair Labor Standards Act. On the contrary, the Association believes that the statute leaves the solution of the travel time question for the processes of collective bargaining between the parties, where it can be solved in a manner best suited to the conditions prevailing in bituminous coal mining.

Therefore, with the consent of the parties to this case, the Southern Coal Producers Association appears before this Court, as *amicus curiae*, to urge the Court to uphold the decision of the District Court.

For the convenience of the Court this brief refers to the Jewell Ridge Coal Corporation as the "Petitioner"; to the United Mine Workers of America as the "Union"; to the

Administrator of the Wage and Hour Division of the United States Department of Labor as the "Administrator"; and to the case of *Tennessee Coal, Iron and Railroad Company, Muscoda Local No. 123, etc.*, 64 Sup. Ct. 698, 88 L. ed. 610; 137 F. 2d 176; 135 F. 2d 320; 40 F. Supp. 4, as the "Muscoda Case."

II. THE ESSENTIAL FACTS.

The pertinent facts established by the evidence and testimony and found by the District Court are as follows:

Bituminous coal is found in seams underground. Main tunnels, which are known as "haulage ways", are bored to give access to such coal. From the haulage ways, laterals, which are called "cross entries", are driven to give access to and from the boundaries of the "rooms" from which coal is taken. 53 F. Supp. 935, 937; (R. 544.)

Electric railways are operated for the removal of mined coal, and they are used also to transport employees to and from their places of work in the mines.

Employees generally fall into two categories. Those who operate and maintain the railways and electric power systems and maintain safety within the mines are known as "company men," and are paid at hourly rates. Included within this category are motormen, brakemen, trackmen, bratticemen, wiremen, and bondmen. 53 F. Supp. 935, 958; (R. 544.) The employees who actually mine the coal from the seams are known as "machinemen" and "coal loaders." The coal loaders, and usually the machinemen, are paid on a piecework basis, which is an agreed rate per ton of coal. However, their hours of labor are important because they are paid rate-and-a-half rate for all coal mined by them after the expiration of seven hours' labor. 53 F. Supp. 935, 938; (R. 545.)

All employees are required to report at their usual working places at a specified time. They come from their homes to the mines in various ways, arriving in time to board the "man trips" which convey the employee to, or near, his place of work. "Man trips" are trips made by trains of

mine cars for that purpose. 53 F. Supp. 935, 938; (R. 545.) Employees carry with them lamps and drinking water. However, before embarking on the man trips, some few employees do various things which occupy them from three to ten minutes.

> "Coal loaders, the most numerous class, do nothing, unless they have brought tools out for repair. Some four or five times a month, they bring tools out for repair, and on such occasions they go by the blacksmith shop and obtain their repaired tools. The bondman, wiremen, bratticemen, trackmen, and such machinemen as ride man-trips, get such tools as they may have brought out of the mine from the tool house, and such supplies as they may need for the day, from the supply house, and load them into the tool cars of their man-trips. However, if these men so desire, they have the option to give their orders for supplies to the section foreman, and such supplies will be delivered on their section overnight by the supply crew. Some machinemen use motors, and those who do, get two gallons of oil from the oil house, approximately 50 pounds of machine bits from the blacksmith shop, and such other equipment as may be necessary, and load such supplies and equipment onto their motors. They get their motors out of the yard, switch them to the sand house, where they fill their four sand boxes and oil the motor. They then run their motors to their assigned places of operation in the mine. Motormen and brakemen go through substantially the same process of getting out their motors and oiling and sanding them, as the machinemen do, before proceeding in the motors to their places of work."
>
> 53 F. Supp. 935, 938 (R. 546.)

Employees who enter the mines at places other than the main portal "catch the man-trips at some man-trip station inside the mine, or walk all the way to their places of work. Their lamps are brought to them by their section foreman." 53 F. Supp., 935, 939; (R. 546.)

No work or labor is required of employees while they are riding the man trips, and supervision is limited to the

enforcement of safety rules and regulations. Occasionally foremen may give working instructions to employees during the man trips, but, as the trial court found,

> "Such instances are rare, as instructions are ordinarily and customarily given at the working place." 53 F. Supp. 935, 939 (R. 547.)

Riding on man trips is neither painful nor unduly uncomfortable. 53 F. Supp. 935, 939 (R. 547.) And as distinguished from the underground travel in iron ore mines, which the Trial Court found to be replete with hazards, the Trial Court has found in bituminous coal mines.

> "... No such painful and burdensome conditions as those described in the iron ore mines." 53 F. Supp. 935, 949 (R. 567).

The face-to-face method of computing work time in bituminous coal mines is a traditional one, which has been accepted throughout the industry for fifty years. 53 F. Supp. 935, 939 (R. 548.) It has been the standard provision for measuring work time, and has been repeatedly incorporated in basic wage agreements made between the bituminous coal mine operators and the union during that period. 53 F. Supp. 935, 940 (R. 550). Those agreements, which have resulted from "collective bargaining in its complete sense" with one of the most powerful labor organizations in America, have secured for bituminous coal miners uniform high rates of pay which contemplate the workday's beginning and ending at the usual working places. 53 F. Supp. 935, 940; (R. 550).

In its 1943 wage demands the union for the first time challenged the face-to-face method of computing work time. However, as the District Court found, the 1943 demand of the union actually was a demand for a flat wage increase to all miners, whether or not they travel underground, and, in reality, not a contention that the Fair Labor Standards Act requires the inclusion of travel time as time worked. 53 F. Supp. 935, 942; (R. 552.)

Following the enactment of the Fair Labor Standards Act, the bituminous coal operators joined the union in seeking from the Wage and Hour Administrator a construction which would not require payment for travel time under the statute (See Houck letter, R. 667). After an extended and comprehensive investigation, the Administrator ruled that the statute does not compel payment for travel time as such in the bituminous coal mining industry. 53 F. Supp. 935, 941; (R. 551.) That ruling remains unchanged, although, as the District Court pointed out, the Administrator was invited to appear in this case and had a representative present at the trial. 53 F. Supp. 935, 945, (R. 566.)

Such findings were accepted by the Circuit Court of Appeals, which said:

> "In view of the long established custom in the coal industry not to include travel time in the work week, the collective bargaining contracts extending over a long period recognizing the 'face to face' basis of pay, the testimony before the committees of Congress, the reason and purpose of the Fair Labor Standards Act and the probable effects and consequences of construing the act to require travel time in bituminous coal mines to be included in the work week, there is strong reason for thinking, as everyone connected with the matter seems to have thought until recently, that it was not the intent of Congress that the act should be so construed in its application to the coal mining industry. The reasons in support of this conclusion are fully and ably set forth in the opinion of the learned judge below and need not be repeated. They would be convincing, were it not for the decision of the Supreme Court in *Tennessee Coal Iron & R. Co.* v. *Muscoda Local No.* 123, *etc.*, U.S. , 64 S. Ct. 698, which we do not think can be distinguished in principle from the case at bar." 145 F. 2d 10, 11 (R. 889).

III. PROPOSITIONS OF LAW.

Proposition No. 1:

It is the function of the courts to apply the statute to the facts of any particular case.

The Fair Labor Standards Act of 1938 was enacted to alleviate

> "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers"

employed in

> "industries engaged in commerce or in the production of goods for commerce"

(29 U.S.C.A. Sec. 202(a))

Since it was designated for application to the whole gamut of industries and mercantile establishments which produce the goods which move in interstate channels or which effectuate such interstate movement, the Act, necessarily, was couched in general terms.

Because the Congress did not delegate to any administrative agency the task of finding facts and determining in the first instance whether particular cases fall within or without the statute, the Fair Labor Standards Act vests in the courts:

> "the independent responsibility of applying ad hoc the general terms of the statute to an infinite variety of complicated industrial situations." *A. B. Kirschbaum* v. *Walling*, 316 U. S. 517, 522; *Jim Skidmore* v. *Swift & Company*, 89 L. Ed. 125, 127.

In making such application, the courts must assign meaning to those terms left undefined by the law. *Walling* v. *A. H. Belo Corporation*, 316 U. S. 624, 631, 634; *Overnight Motor Transportation Company* v. *Missel*, 316 U. S. 572, 579; *Armour & Company* v. *Wantock*, 89 L. Ed. 120, 123.

In the instant case, determination of the issue presented entails the assignment of a meaning to the term "work week" as used in Section 7 of the Fair Labor Standards Act. That section provides:

> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce . . . for a workweek longer than forty hours . . . unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

The statute does not define the term "work week," thus imposing upon this Court the task of interpreting and construing it in this case. That interpretation and construction is the sole question of law presented in this case. Once a meaning is assigned to the term, the issue is whether the facts as found by the trial court require affirmance of its judgment that the underground travel time is not part of the work week or affirmance of the Circuit Court of Appeals' judgment that it is.

Proposition No. 2.

The court will examine all relevant aids to construction in applying section 7 to effectuate the intention and purpose of the Congress.

It is a fundamental canon of statutory construction that the legislative intention and purposes of the law must be effectuated: *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534; *Foster* v. *United States*, 303 U. S. 118. So basic is the rule, the Court has held that, if necessary, the literal meaning of words used in a statute must be sacrificed

> "that the purpose may not fail." *Ozawa* v. *United States*, 260 U. S. 178, 194.

And in *Northwestern Mut. L. Ins. Co.* v. *Gridley*, 100 U. S. 614, 615, the Court pointed out that

> "a thing which is within the intention of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers."

Because the legislative intention must be effectuated, the courts may resort to extrinsic factors as an aid to the construction of general language which is susceptible of different meanings dependent upon the circumstances surrounding its use. Sutherland, in his work on "Statutes and Statutory Construction" points out that

> "It must be understood, of course, that a well-drafted statute will in most cases and certainly should, present the words used with sufficient precision and accuracy that additional inquiry by the court will be unnecessary. But as all future circumstances cannot be anticipated by even the most far-sighted legislator the function of judicial interpretation cannot be completely avoided. When such a circumstance arises, certainly the safest starting point for interpretation will be the statute itself. But it is by no means the safest stopping point. Before the true meaning of the statute can be determined consideration must be given to the problem in society to which the legislature addressed itself, prior legislative consideration of the problem, the legislative history of the statute under litigation, and to the operation and administration of the statute prior to litigation." (Vol. 2, Section 4505)

This principle also is enunciated by the Court, in *United States* v. *Dickerson*, 310 U. S. 554, 561, in which the Court said:

> "The respondent contends that the words of §402 are plain and unambiguous and that other aids to construction may not be utilized. It is sufficient answer to deny that such words when used in an appropriation bill are words of art or have a settled meaning. See

United States v. *Perry*, 50 F. 743, 748 (CCA 8th). The very legislative materials which respondent would exclude refute his assumption. It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. See *Boston Sand & Gravel Co.* v. *United States*, supra (278 U. S. at 48, 73 L. ed. 177, 49 S. Ct. 52). The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction."

See, also, *United States* v. *Fisher*, 2 Cranch (US) 358, 386; *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 543.

Resort to all relevant aids to construction is particularly necessary where the Court is called upon to apply general language used in remedial social legislation enacted to apply

> "to an infinite variety of complicated industrial situations". (*A. B. Kirschbaum* v. *Walling*, 316 U. S. 517, 523)

Faced with the necessity of determining whether certain labor union activities were included within the proscriptions of the Sherman Act, this Court said:

> "While we must regard the question whether labor unions are to some extent and in some circumstances subject to the Act as settled in the affirmative, it is equally plain that this Court has never thought the Act to apply to all labor union activities affecting interstate commerce. The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute,

and in the performance of that function it is appropriate that courts should interpret its words in the light of its legislative history and of the particular evils at which the legislation was aimed." (*Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 489)

Again, in *Phelps Dodge Corporation* v. *National Labor Relations Board*, 313 U. S. 177, 185, in which the issue involved was the application of Section 8(3) of the National Labor Relations Act, this Court spoke in the following language:

> "Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition. That is why all relevant aids are summoned to determine meaning. Of compelling consideration is the fact that words acquire scope and function from the history of events which they summarize. We have seen the close link between a bar to employment because of union affiliation and the opportunities of labor organizations to exist and to prosper. Such an embargo against employment of union labor was notoriously one of the chief obstructions to collective bargaining through self-organization. Indisputably the removal of such obstructions was the driving force behind the enactment of the National Labor Relations Act. The prohibition against 'discrimination in regard to hire' must be applied as a means towards the accomplishment of the main object of the legislation. We are asked to read 'hire' as meaning the wages paid to an employee so as to make the statute merely forbid discrimination in one of the terms of men who have secured employment. So to read the statute would do violence to a spontaneous textual reading of §8(3) in that 'hire' would serve no function because, in the sense which is urged upon us, it is included in the prohibition against 'discrimination in regard to . . . any term or condition of employment.' Contemporaneous legislative history, and, above all, the background of industrial experience forbid such textual mutilation."

Proposition No. 3.

The legislative history of the Fair Labor Standards Act is a relevant aid to the construction of section 7 of the statute.

In determining Congressional intent, in order to give statutory language its proper scope and function, the Court will examine the history of the law. This examination may include a study of the events and circumstances which led to the presentation of the measure to the legislature and a scrutiny of the course of the legislation through the Congress.

Consideration of the events and circumstances which motivated the passage of the Fair Labor Standards Act is particularly important in construing its language; for an examination of the evils sought to be remedied provides a proper medium to guide the Court in ascertaining the scope and meaning of the law. *Stafford, et al* v. *Wallace, Secretary of Agriculture*, 258 U. S. 495; *Church of the Holy Trinity* v. *United States*, 143 U. S. 457; *Phelps Dodge Corporation* v. *National Labor Relations Board, supra.* As was said in the *Church of the Holy Trinity* case:

> "... and for this the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."

Having examined such factors, the Court, in addition, will examine the course pursued by the statute in its passage through the legislature. This may include resorting to the testimony of the witnesses who appeared before the Congressional committees which conducted hearings; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294; *O'Hara, et al.* v. *Luckenbach S.S. Co.*, 269 U. S. 364; to the reports of the Congressional committees to which the measure was referred; *United States* v. *Darby Lumber Co.*, 312 U. S. 100; *Michaelson, et al.* v. *United States, etc.*, 266 U. S. 42; and to the debates in Congress, *United States* v. *City and County of San Francisco*, 310 U. S. 16; *United States* v. *Dickerson, supra.*

Proposition No. 4.

The contemporaneous construction of the statute by the government agency charged with enforcing it is entitled to great weight in a judicial application of the act.

The interpretation of a statute made by the agency entrusted with the duty of administering and enforcing it also is relevant for the Court to consider in determining its meaning; and where such agency has adhered to a practical interpretation for a substantial period of time

> "such construction in cases of doubtful meaning is accepted unless there are cogent and persuasive reasons for rejecting it." *United States* v. *Shreveport Grain & Elevator Company*, 287 U. S. 77; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375; *Brewster* v. *Gage*, 280 U. S. 327; *Norwegian Nitrogen Products Company* v. *United States, supra.*

Furthermore, as the Court said in the *Norwegian Nitrogen Products Company* case,

> "The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." (Page 315)

In this case, the persuasiveness of administrative interpretation is enhanced. The Congress failed to define the meaning of work time under Section 7 of the Fair Labor Standards Act because

> "The myriads of circumstances in which it would be necessary to determine working time in individual cases or classes of cases could not be covered with particularity by statute." *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda*, Local No. 123, Circuit Court of Appeals, Fifth Circuit, 137 F. 2d 176, 181.

The task confronting this Court is to make a practical application of the term "work week" which is consonant with the purposes of the Fair Labor Standards Act. This Court has recognized that it cannot, and is not called upon to, and should not, pronounce an inflexible definition of working time which would be applicable to any and all circumstances, thus reducing the decision in any case which involves a query whether particular time is time worked to an application of that definition to the particular facts. *Armour & Company* v. *Wantock*, 89 L. ed. 120, 125. In that case, discussing the definition of "work" utilized in the Muscoda case, the Court said:

> "To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading. The context of the language cited from the Tennessee Coal, Iron & R. Co. Case should be sufficient to indicate that the quoted phrases were not intended as a limitation on the Act, and have no necessary application to other states of facts."

Rather, it has dealt with such questions as problems in which

> "what is needed is something of that common sense accommodation of judgement to kaleidoscopic situations which characterizes the law in its treatment of problems of causation." *Gully* v. *First National Bank*, 299 U. S. 109, 117.

The language of the Court in *Walling* v. *A. H. Belo Corporation*, 316 U. S. 624, 634, summarizes the attitude of the Court toward the question here:

> "The problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of 'regular rate' when Congress has failed to provide one. Presumably Congress refrained from attempting such a definition because the employment relationships

to which the Act would apply were so various and unpredictable. And that which it was unwise for Congress to do, this Court should not do."

Because of this recognition of the empirical nature of the investigation which must be made to apply Section 7 of the Fair Labor Standards Act to any existing set of facts, the Court has held that the interpretations of the Wage Hour Administrator

> "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 89 L. ed. 125, 129.

Proposition No. 5.

Custom and usage is a relevant aid to the court in construing section 7 of the Fair Labor Standards Act.

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne* v. *Eisner*, 245 U. S. 418, 425.

> "It is only as custom and usage and agreement attach a particular meaning to a particular word that it has any significance in relation to either a tangible or an intangible object." *Statutes and Statutory Construction*, J. G. Sutherland, Vol. 2, Sec. 4502.

The truism contained in the above quotations explains why, in construing a statue, the courts examine the custom and usages prevailing in the fields in which the statute is intended to apply. *United States* v. *Isham*, 17 Wall. 496; *United States* v. *Midwest Oil Company*, 236 U. S. 459;

Slidell v. *Grandjean*, 111 U. S. 412; *Skidmore* v. *Swift & Co.*; 89 L. ed. 125.

In the *Skidmore* case this Court was applying Section 7 of the Fair Labor Standards Act in connection with waiting time. Discussing the relevancy of the Wage-Hour Administrator's interpretations, the Court said:

> "Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution."

In the *Musçoda* case, *supra*, the Fifth Circuit Court of Appeals recognized the importance of custom and usage in connection with the very problem here presented, saying

> "The Act does not define 'work time' or even 'work.' It may apply to each and every industry. What would be work in one industry may not be in another." 135 F. 2d 320, 323.

And in this particular case it is relevant for the Court to notice that custom and usage in the bituminous coal industry, as formalized in a long series of collective bargaining agreements, created the concept of working time which was adopted by the Wage-Hour Administrator.

Where the persons affected by a statute have pursued a uniform course of conduct for a long time and that course accords with the construction of the law made by the government agency charged with its enforcement, the construction of the act thus adopted merits serious consideration by the Court. *Helvering* v. *Griffiths*, 318 U. S. 371; *United States* v. *Hill*, 120 U. S. 169; *Robertson* v. *Downing*, 127 U. S. 607.

In regard to the Fair Labor Standards Act, this Court has declared the very sound doctrine that

> "Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights

shall be at variance only where justified by very good reasons." *Skidmore* v. *Swift & Co., supra,* 128.

Where, as here, the custom and usage in the bituminous coal industry created a concept of work time which was well established prior to the enactment of the Fair Labor Standards Act and that concept was accepted by the Wage-Hour Administrator in the "public enforcement" of the law, the value of that custom and usage in "good judicial administration" is undeniable.

IV. AIDS TO STATUTORY CONSTRUCTION.

A. Legislative background of Federal Fair Labor Standards Act.

In considering the legislative history of the Federal Fair Labor Standards Act, it is relevant to consider events leading up to adoption of the act insofar as they have any bearing on the intention of Congress. When it is considered that the contention is now being made that Congress intended to change a long-established practice in the bituminous coal mining industry, developed through collective bargaining, it becomes extremely relevant to consider whether the Congress was cognizant of the practices and was apprised of any desire on the part of either of the parties to the collective bargaining agreements for a change brought about through legislation.

It is a matter of public record that labor problems within the bituminous coal mining industry had been brought to the attention of the Congress almost continuously for a period of at least fifteen years prior to the adoption of the Federal Fair Labor Standards Act and that at the time of the adoption of this act the Congress was acutely conscious of the status of labor relations in the bituminous coal mining industry.

During the years following the First World War, many measures which dealt with the bituminous coal mining in-

dustry were introduced in Congress. Hearings were held before the committees of Congress; representatives of the operators and of the United Mine Workers appeared before Congressional committees. None of these measures resulted in general legislation prior to 1933. However, in 1920, when the Congress enacted the statute for the leasing of lands in the public domain for the conduct of mining operations, it included a provision that all leases made pursuant to the statute should include

> "a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency" *Feb. 25, 1920, C. 85, §30, 41 Stat. 449; 30 U. S. C. A. §187.*

The Secretary of the Interior was

> "authorized to prescribe necessary and proper rates and regulations and to do any and all things necessary to carry out and accomplish the purposes"

of that mandate *(Feb. 25, 1920, C. 85 §32, 41 Stat. 450; 30 U. S. C. A. §189)*. Pursuant to that authority, "Regulations concerning Coal Mining Leases, Permits and Licenses" were approved April 1, 1920, containing a standard form of lease to be used. That lease provided that the lessee,

> "shall not require or permit miners or other employees, except in case of emergency, to work more than eight hours in any one workday. . . ." *(General Land Office, Circular No. 679, P. 14)*

That provision has remained in the standard form lease used under the Act of February 25, 1920, and now appears in the "Regulations Applicable to Coal Permits, Leases, and Licenses, Exclusive of Alaska" issued by the Secretary of the Interior. *(Code of Federal Regulations*, Part 193, Title 43.)

Under the 1920 Act, hundreds of leases of coal lands have been made, and the "Annual Report of the Secretary of the

Interior for the Fiscal Year Ended June 30, 1943" mentions three-hundred and sixty-three coal land leases outstanding as of that date. (Page 173).

It is significant to note that since the passage of the 1920 leasing statute there have been no recorded regulations or interpretations by the Secretary of the Interior requiring the inclusion of underground travel time in the workday in coal mines operated under statutory leases, although, during this time, the practice of excluding such travel time from the workday has prevailed in all bituminous coal mines in the United States.

And it is worthy of note that in the month following the passage of the 1920 law, Mr. Lewis, President of the United Mine Workers, at the request of the President of the United States, signed a wage agreement incorporating the report of the Bituminous Coal Commission appointed by the President which defined the workday as

> "eight hours work in the mines at the usual working places".

Therefore, for more than eighteen years prior to the enactment of the Fair Labor Standards Act, there existed a public law fixing a maximum "workday" of eight hours for certain coal miners. Not once during that time did the Government agency charged with enforcing it construe it as revoking the face-to-face method of computing work time; nor did the United Mine Workers contend that it required any deviation from or exception to the existing practice of incorporating the face-to-face method in wage agreements made with the coal operators. The Houck letter, dated July 9, 1940, states

> "This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years and is the result of collective bargaining in its complete sense." (R. 669)

In 1933 Congress enacted the National Industrial Recovery Act, which provided for the promulgation of "codes of fair competition" which were to have the force and effect of law. In September, 1933, such a code was approved by the President of the United States for the bituminous coal mining industry. The operators and representatives of the United Mine Workers agreed upon this code. In the hearings which led up to the adoption of the code no demand was made by the representatives of the miners for any change in the face-to-face method of computing pay; no point was raised to the effect that travel time was work time or that it should be compensated as such. The code adopted in 1933 provided for an eight-hour day at the face of the mine or at the usual working place. In 1934 this was amended to provide for a seven-hour day. This code was interpreted so that there was no violation of the code because of travel time after eight hours under the original code or seven hours under the amended code.

In 1935 the first Bituminous Coal Act was passed by Congress. It dealt specifically with wages, hours, and collective bargaining in bituminious coal mining. It said nothing about changing the face-to-face method of computing pay. It made no provision for pay for travel time as such. What is of far greater significance, no contention was made by the United Mine Workers in the hearings held prior to the adoption of the Bituminous Coal Act that such travel time should be compensated as work time.

In 1937 the second Bituminious Coal Act was passed. The hearings preceding passage of that Act disclose no mention of travel time and no demands on the part of the United Mine Workers that travel time should be compensated as such or that it should be taken into account in connection with the determination of the costs of producing coal or that there should be any change in the established face-to-face method of computing the pay of employees.

Thus, we find that through a period of many years prior to the passage of the Federal Fair Labor Standards Act

in 1938, Congressional committees had conducted investigations into the bituminous coal mining industry; had held hearings on proposed legislation; had made reports to the Congress; that the Congress had enacted legislation dealing with the bituminous coal mining industry; and that at no time was there any claim advanced that travel time should be treated as work time or compensated as such by statutory provision. The fact that Congress was acutely aware of labor and competitive conditions in the bituminous coal mining industry during all these years, that no assertion was made with respect to travel time, that no demand was made for legislative remedy, and that no specific legislative provision dealt with compensation for travel time as such, presents compelling evidence, both that there was no attempt on the part of the United Mine Workers to secure legislative remedy and that the Congress did not intend to provide a legislative remedy for an alleged evil now but never before asserted, and which during all those years was not alleged by the union or recognized by the Executive branch or the Congress.

The first general federal regulation of wage and hour standards for private employment was contained in Sec. 7 (a) of the National Industrial Recovery Act, which provided that every code of fair competition was to contain the condition that employers comply with the maximum hours, minimum pay rates, and other conditions of employment approved or prescribed by the President. As the Administrator of the Wage and Hour Division has pointed out, that was

> "undoubtedly the most important antecedent of the Fair Labor Standards Act" *(First Annual Report of the Administrator of the Wage and Hour Division, United States Department of Labor, for the calendar year 1939, P. 3).*

The "Code of Fair Competition for the Bituminous Coal Industry" under the National Industrial Recovery Act was issued in September, 1933, following a conference in which

representatives of the bituminous coal operators and the United Mine Workers participated. At the hearings John L. Lewis stressed the desirability of arriving at provisions covering wages and hours through the process of collective bargaining. He said:

> "It has been our interpretation of the National Recovery Act from its earliest stages . . . that the real purposes of the law would be best attained by collective agreements between representatives of organizations of employees and representatives of employers who had associated themselves together for the purpose of formulating a code of fair competition for an industry. In other words, provisions as to wages and working conditions for a proposed code could not be submitted by employers or become the subject of investigation and determination by the Recovery Administration, until every opportunity had been given to employers and employees to meet and agree upon maximum hours of labor, minimum rates, and other necessary conditions of employment." (Hearings on a Code for the Bituminous Coal Mining Industry, before the National Recovery Administration, Washington, August 9, 1933).

The code for the bituminous coal industry, resulting from these hearings, contained the following provision regarding hours of labor:

> "No employee except members of the executive, supervisory, technical and confidential personnel, shall be employed in excess of 40 hours in any calendar week after the effective date of this Code. No employee shall be required or permitted to work more than *eight hours in any one day at the usual working places* or otherwise in or about the mine (exclusive of lunch period) whether paid by the hour or on a tonnage or other piece work basis." (Code of Fair Competition for the Bituminous Coal Industry, approved September 18, 1933, Article III; italics supplied).

In March, 1934, Article III was amended to provide:

> "No employee, except members of the executive, supervisory, technical and confidential personnel shall be

employed in excess of seven hours per day and five days per week, subject to the exceptions hereinafter stated.

"*Seven hours of labor shall constitute a day's work and this means seven hours work at the usual working places* for all classes of labor, exclusive of the lunch period, whether they be paid on the day or the tonnage or other piecework basis; except in cases of accident which tem-temporarily necessitate longer hours for those required on account thereof; and also excepting that number of workers in each mine whose daily work includes the handling of mantrips and those required to remain on duty while men are entering and leaving the mine." (Italics supplied).

The code remained in effect until 1935, when the National Industrial Recovery Act was declared unconstitutional by the United States Supreme Court. And it will be noted that the provision concerning hours of work was that which for many years had been contractually agreed upon between the bituminous coal operators and the United Mine Workers, thus lending Government approval to the provision.

In May, 1937, Representative Connery introduced a bill designated H.R. 7200, entitled "Bill for the Establishment of Fair Labor Standards in Employment In and Affecting Commerce, and For Other Purposes." And on the same day, Senator Black introduced S. 2475, bearing the same title. The bills, which differed but slightly, were referred respectively to the House Committee on Labor and to the Senate Committee on Education and Labor. From June 2, 1937, to June 22, 1937, these committees held joint hearings, the proceedings of which have been published in three volumes. John L. Lewis testified at length, but nowhere indicated that travel time should be included as time worked in the workday or workweek. On the contrary, he indicated that he did not anticipate that the bill would affect the coal industry. The following excerpts from the hearings are in point:

"SENATOR LAFOLLETTE. * * * As I understand it, the objective of this bill as outlined in section 23,

one of them is to prevent the board from going in and upsetting collective bargaining agreements or entering the field where collective bargaining is actually functioning in a bona-fide manner, and thereby producing the result of the action of the employer and employee represented by genuine and effective labor organization.'" (Page 280).

"MR. LEWIS. * * * For instance, frankly I would not want this bill to convey power to a board to order an investigation into all of the wage agreements in the mining industry right now, or to give the board power to decide that the collective-bargaining agreements in the mining industry were not sound, not proper, were confiscatory, or not in harmony with the facts of the industry and order a modification thereof. I think the power of the board should be limited to cases which run below the level of the standards fixed by Congress. I see endless confusion in the adoption of section 5 now. I see a drift toward the complete fixation of wages in all industry by governmental action." (Page 281).

SENATOR HOLT. Would you favor allowing the board to investigate collective bargaining agreements where the collective bargaining agreement was beyond the wage level?

"MR. LEWIS. No; I see no point in it.

"SENATOR HOLT. If they have a right to investigate collective bargaining agreements below the wage level why should not they have the right to investigate collective bargaining agreements above the wage level?

"MR. LEWIS. Merely because their right of investigation of agreements that were substandard would be for the purpose of ascertaining whether that was so and of modifying them to meet the congressional standards." (Page 297).

Excerpts from "Joint Hearings Before the Committee on Education and Labor, United States Senate, and the Committee on Labor, House of Representatives, June 2-22, 1937."

On July 6, 1937, the Senate Committee favorably reported an amended bill in the nature of a substitute, stating:

> "The right of individual or collective employees to bargain with their employers concerning wages and hours is recognized and encouraged by this bill. It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-work-hour industrial workers who are the helpless victims of their own bargaining weakness that this bill seeks to assist to obtain a minimum wage." (Senate Report No. 884, 75th Cong.)

The measure was debated in the House and Senate from time to time beginning in the Senate on July 27, 1937, and various amendments were discussed. Although the debates do not touch upon the meaning of work day, work week, or hours of work, they do contain various expressions which show an intention not to interfere with the process of collective bargaining. The following excerpts from the Congressional Record are in point:

> "MR. WALSH. Next, does the bill affect collective bargaining agreements already made or hereafter to be made between employer and employee?
>
> "MR. BLACK. It does not." (Senate, July 27, 1937. Congressional Record, Vol. 81, P. 7650.)
>
> "MRS. NORTON. * * * It is not the intention of this amendment, or of the bill, to start fixing wages in all industries but only in those in which oppressive wages are being paid to a substantial portion of the workers * * *" (House, December 13, 1937, Congressional Record, Vol. 82, P. 1391.)
>
> "MR. RANDOLPH. * * * It (the bill) is not concerned with that fortunate majority of the laboring classes whose collective bargaining power is sufficiently potent to insure the preservation of their industrial rights.

"But it is concerned with those millions in industry who are unprotected and unorganized * * *" (House, December 13, 1937, Congressional Record, Vol. 82, p. 1395; parenthesis supplied.)

"MR. CURLEY. * * * There is no conflict of jurisdiction under the provisions of this fair standards of labor bill, and the existing labor organizations of this country. The bill concerns only of relieving the paralysis which, at present, shackles misery and poverty to millions of heads of families, who are underpaid and causing a colossal financial loss in purchasing power because of existing deplorable conditions." (House, May 23, 1938, Congressional Record, Vol. 83, P. 7283.)

"MR. BOILEAU: "What is more, we are preserving for organized labor its right to bargain collectively and it will bargain for a higher wage than that." (House, May 23, 1938, Congressional Record, Vol. 83, P. 7290.)

"MR. ALLEN. * * * This bill has a threefold purpose as I see it. First, it eliminates sweat shops— * * * The bill does not affect organized labor, but those 5,000,000 American working men and women who have not yet been benefited by organized labor." (House, May 23, 1938, Congressional Record, Vol. 83, P. 7291.)

"MR. FITZGERALD. * * * I would have you observe that this proposed legislation will not improve the wages and hours of the majority of workers, nor does it attempt to. For I am greatly pleased to say that the majority of workers do not need this legislation because they are receiving a living wage and are not forced to work unreasonable hours." (House, May 23, 1938, Congressional Record, Vol. 83, P. 7310.)

Although the above statements were made at various times while the measure was being amended and revised, and, therefore, not with respect to the bill in its final form, they show a continuing intention not to interfere with the processes of collective bargaining.

Although no statute was enacted during 1937, in the third session of the 75th Congress, on January 3, 1938, the Presi-

dent again recommended legislation governing hours and wages. In his message, he said:

> "We are seeking, of course, only legislation to end starvation wages and intolerable hours; more desirable wages are and should continue to be the product of collective bargaining." (Congressional Record, Vol. 83, P. 9.)

Pursuant to that request measures were again presented to the House, and the Fair Labor Standards Act of 1938 was passed, and approved by the President on June 25, 1938.

Shortly before its passage, Congressman Connery again summarized its objective, stating:

> "The thing to remember about this bill is that it is not designed to be a cure-all for industrial wages. It is merely aimed at wiping out sweatshop conditions and child labor. Those are the two salient features and should be kept in mind." (House, May 23, 1938, Congressional Record, Vol. 83, P. 7322.)

The statute states as its objective ". . . to correct and as rapidly as practicable to eliminate" . . . those . . . "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers . . ." (Title 29, U. S. C. A., Sec. 202). In that language the law expressly states that its objective is that sought by the President in his message of January 3, 1938—namely, to eliminate wages which will not provide workers the means of maintaining a minimum standard of living and to prevent intolerable hours of work detrimental to the health and well-being of the workers. Nowhere in the statute or in the Congressional proceedings prior to its enactment is there any expression of intention to compel an increase of earnings or a reduction of hours where not deemed essential to achieve these objectives.

B. Custom and Usage.

Universally, the custom and usage in the bituminous coal industry has been to exclude travel time from the scope of hours worked. It has been recognized by both the coal operators and their employees that any other system would economically demoralize the industry and inflict mutual hardship upon them. (Houck letter, R. 670)

Necessary variation in the amount of time spent in going between the portal and the face, or other usual working place of the miner, has dictated the established policy of excluding travel time from hours worked. Because this travel time varies from mine to mine and changes constantly in any one mine, it was apparent to employers and employees that the inclusion of travel time as work time would disrupt wage scales and normal competition.

In bituminous coal mines travel time ranges from nothing to three hours per day, and labor cost constitutes about two-thirds of the total mine cost of producing bituminous coal. It is apparent, therefore, that should travel hours be declared hours of work under Sec. 7 of the Fair Labor Standards Act, the payment of uniform wage rates throughout the industry would be competitively impossible. And, John L. Lewis himself has said,

> "The United Mine Workers of America, in supplying a uniform, competitive labor cost for bituminous coal mining, has been the only stabilizing force which the industry ever had." (August 9, 1933, hearings before National Recovery Administration)

It has been a mutual recognition of the essentiality of avoiding the disruption which would attend the inclusion of travel time as time worked which has been a compelling factor in the drafting of collective-bargaining agreements between the coal operators and the United Mine Workers. For over fifty years their contracts have defined working time as time spent at the face of the mine, or at the miners'

usual working place, and have excluded travel time. (Houck letter, R. 669)

Although they have negotiated many master agreements and hundreds of local agreements, and numerous significant changes have been made in the contracts, the contracts have all excluded travel time from hours worked.

Apparently the Circuit Court of Appeals was convinced that the face-to-face method of computing worktime has been abrogated by voluntary agreement of the parties. It states in its opinion that

> "The disturbing effect of the decision here will not be so great as it otherwise would, in view of the fact that, by agreement between the miners and operators, the portal to portal system of computing the work week has now been adopted in the industry." 145 F. 2d 10, 13, (R. 893)

The agreement referred to is that commonly designated as the "Ickes-Lewis Agreement," and a brief reference to the circumstances attending its execution conclusively demonstrates that in no true sense does it represent a voluntary shift from the face-to-face method to the portal-to-portal method. In the March, 1943, collective-bargaining negotiations, the United Mine Workers, under the heading "Hours of Labor" demanded:

> "To conform with the basic and legal requirement for the industry, the maximum hours and working time provisions be amended to establish portal to portal for starting and quitting time for all underground workers", 53 F. Supp. 935, 941 (R. 552)

The succeeding demand, under the heading "Wage Rate Increases" sought a flat wage increase of two dollars per day

"for all classifications of inside and outside day men" with equivalent raises for pieceworkers, and provided

> "The increased rates include compensation to meet the portal to portal starting and quitting time."

The District Court properly found that the union's demand was

> "actually a demand for a flat wage increase to all mine workers, whether or not they spend any time traveling underground to their usual places of work, and not truly a contention that the Fair Labor Standards Act requires inclusion of the actual travel time as work time for those who have actual travel time underground." 53 F. Supp. 935, 942 (R. 552).

The coal mine operators and the union were unable to negotiate an agreement and the dispute was certified to the National War Labor Board on April 22, 1943 (Ex. 33, R. 302, 711). Work stoppages occurred; and on May 1, 1943, the Government seized the mines, placing the Secretary of the Interior in charge of operating them. The events which occurred between the commencement of negotiations in March, 1943, and the execution of the "Ickes-Lewis Agreement" in November, 1943, are set forth in detail in Petitioner's brief, at Pages 38 to 47, and need not be repeated here. It will suffice here to mention several important facts:

1. Throughout the protracted dispute, the union repeatedly endeavored to secure a general wage increase to all employees represented by it, using the so-called "portal-to-portal" demand merely as a device to circumvent wage stabilization rules prohibiting the increase. The National War Labor Board decision of June 17, 1943, emphasizes this:

> "The mine workers' demand of $2.00 a day was . . . based upon an assumption or estimate that the travel time amounted on an average to an hour and one-half a day . . . The United Mine Workers proposed to spread this amount over all the workers including those who did not go underground, and so arrived at the proposed general wage increase of $2.00 for all mine workers . . . The demand is plainly and unmistakably a demand for an 'indirect wage increase in violation of the wage stabilization policies' contrary to the Board's directive order of May 25, 1943." (R. 743)

2. The "Ickes-Lewis Agreement" does not contain compensation for actual travel time, nor does it include actual travel time within the workweek. The agreement, which is a modification of the Second Illinois Supplemental Agreement, provides a method of wage calculation which assumes that each employee has forty-five minutes of travel-time (R. 835). That the assumption does not include compensation for actual travel time is made clear by the fact that in Petitioner's two mines, for example, average daily travel time is 88 minutes and 67.1 minutes, respectively. (R. 238, 239).

In no sense, therefore, does the agreement provide that individual mine employees shall receive compensation for actual travel time, or that such actual travel time should be included within the work week.

3. Insofar as the Ickes-Lewis Agreement represents a deviation from the face-to-face method of computing worktime in the bituminous coal mines, it can in no sense be construed as a voluntary acceptance by the bituminous coal operators of the portal-to-portal method. As previously indicated, the Ickes-Lewis Agreement does not provide for true portal-to-portal compensation; and it does not represent the uncoerced policy of the coal operators.

While in June, 1944, the Southern bituminous coal operators made an agreement with the United Mine Workers incorporating the Ickes-Lewis provisions, they made the agreement in order to secure release of their mines from Government possession. While the bituminous coal mines were still in Government possession, C. J. Potter, Deputy Coal Mines Administrator, issued a memorandum "To All Operating Managers for the United States for Bituminous Coal Mines" directing them to put the terms of the Ickes-Lewis Agreement "in effect as of November 3", 1943. To find, as the Circuit Court of Appeals did, that "by agreement between the miners and operators, the portal to portal system of computing the workweek has now been adopted

in the industry," is to ignore realities. A hybrid arrangement made between the Secretary of the Interior and the President of the United Mine Workers was imposed upon the industry to avert work stoppages in the coal fields. It was accepted by the operators as a temporary war measure for the period ending April 1, 1945, to secure the return of their properties and to maintain the production of urgently needed coal since it was made clear to them that the Government had determined to compromise the wage dispute with the United Mine Workers on that basis and that their properties would not be returned to them unless they accepted the Ickes-Lewis "Agreement".

C. Contemporaneous Construction.

Provision that the work day shall be the time spent at the face or at the employee's usual working place has been included in all agreements since the passage of the Fair Labor Standards Act of 1938, with the full acquiescence of the Wage and Hour Division, which is the Government agency charged with the duty of enforcing this law.

On July 9, 1940, Earl E. Houck, Director of the Legal Department of the United Mine Workers of America, addressed a letter to Colonel Philip B. Fleming, Administrator, Wage and Hour Division, Department of Labor, in which he requested the division to "accept the standards of wages and hours of work, and the definition of working time as set forth in the Appalachian agreement (which embodies the customs and traditions of the bituminous mining industry) as complying both with the provisions of the Fair Labor Standards Act and the Interpretative Bulletin No. 13, to the effect that 'reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act.'" In that letter, Mr. Houck urged as reasons for such acceptance the following:

> "The United Mine Workers of America and coal operators of the United States have been negotiating wage agreements for a period of fifty years. The Appa-

lachian agreement, covering as it does a great number of men and mines, has been worked out over that period of time and covers within its general provisions myriad wage rates, conditions of work, and hours of employment. This agreement, with its twenty-three supplemental agreements, constitutes a whole document. In those conferences, of course, hours of work has been one of the principal matters of consideration during this period of time. Hours of work with wage rates constitute the heart of any such agreement. In this basic industry we have provided for seven-hour days, five-day weeks, thirty-five hours per week, with high rates of pay. The basic inside day rate in the North is $0.857 per hour, and in the South it is $.80 per hour. The underground workers are paid on this basis with maximum rates for mobile loading machine operators, approximately $1.09 per hour. In addition, the agreement provides, 'Work by mine workers paid by hour or day in excess of seven hours in one day, or thirty-five hours in any one week, shall be paid for at the rate of time and one-half * * *' It is our opinion that these substantive provisions of the agreement are among the highest standards of labor provided in any industry in the United States, both as to hours of working time and as to wages paid. There is full and complete understanding in the industry between employer and employees as to the application of these provisions. This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years and is the result of collective bargaining in its complete sense.

"There are many reasons why the provision as to working time has been set out as provided by this agreement. The impracticability of measuring time by any other method is inherent in the very nature of mining coal. Coal mines are sometimes very extensive. When they are first opened up, the working places are, of course, close by and near to the opening of the mine. In such cases there is no problem of either transportation of the men to the working places or time consumed in reaching them; but as mines grow older, and working places move farther and farther away from the portal or opening of the mine, and as such condi-

tions develop it becomes necessary for provision to be made for transportation of the men over long distances to their working places. This is usually provided by what is known in the industry as 'man trips.' These trips are scheduled to leave the outside or opening of the mine at a certain hour, so that all the employees will reach their working places by the hour at which work regularly begins at the working places throughout the mine, and these trips are also scheduled to leave the inside of the mine when the day's work is done, at the conclusion of the seven-hour period of work at the working places. Among other provisions of the agreement, there is provided a time for starting the day's work and a lunch period, as well as a time for expiration of the work day. There is some variation in this, depending upon local conditions as to the starting and quitting time at the various collieries. The agreement provides for a certain tolerance. In any event, the starting and quitting time are no more than seven hours apart, exclusive of the lunch period.

"In the many conferences that have been held over this period of fifty years, naturally all manner of suggestions and proposals for amplification or amendment of the agreement has been made both by the mine workers and the operators.

"The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual working place. Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898.

"It is urged that any ruling requiring such a change in the custom, tradition and contract provision so as to change the work day from 'seven hours' work in the mines at the usual working places' to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically

all of the coal mines in the United States. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated. In such an event, it would make necessary the reassembling of the Appalachian Joint Wage Conference and it would be faced with an issue that would be almost impossible of solution by agreement, resulting in an industrial conflict that could paralyze the nation. This would be a most unhappy result to flow from an act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and the high rates of pay in the bituminous coal mines. The great amount of money involved in the case of extra payments by the operators or the great changes that would be required in the rates of pay to the miners, should any change in the present contract be necessary by reason of a new standard for the measurement of time worked, is so serious that a negotiated adjustment would seem to be impossible." (R. 667 et seq.)

On July 18, 1940, Colonel Fleming replied, and in part stated:

"The division does recognize, however, that some industries present peculiar hours worked problems and that such problems have been settled over a period of years to the satisfaction of both employers and employees through bona fide collective bargaining agreements. Such cases involve difficult hours worked questions which are not susceptible of categorical answer. Strong arguments are available to support more than one solution and, in practice, the problems have been adjusted by means of a long process of give and take. Although the particular adjustment may be subject to some doubt, in our opinion, however, the courts in deciding these problems will take into consideration and be largely influenced by the custom and practice

which has been set forth in collective bargaining agreements. Therefore, this division in carrying out its enforcement duties in the bituminous coal mining industry under the act will accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the particular industry and are supported by a long history of bona fide collective bargaining agreements. In view of the circumstances which you describe in your letter and in view of the special facts which were developed at conferences with representatives of the industry, it is our opinion that the practice of computing working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable." (R. 672, 673)

Following that acceptance of Mr. Houck's request, the Wage and Hour Division on July 27, 1940, issued a release in which it stated:

"Colonel Fleming announced that on the basis of an inquiry submitted by the bituminous coal mining industry, the Wage and Hour Division in carrying out its enforcement duties in that industry will accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in a particular industry and are supported by a long history of *bona fide* collective bargaining agreements. In view of the circumstances described by the industry in submitting its inquiry, Colonel Fleming announced that practice of computing working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable. Colonel Fleming explained the term 'face to face' to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the place of work and the time spent in returning from the working place to the portal in the evening." (R. 675)

Therefore, it is established beyond any reasonable doubt that the Wage and Hour Division in enforcing Section 7

of the Fair Labor Standards Act adopted as its own the definition of working time established by agreement between the coal operators and the United Mine Workers of America for more than half a century.

ARGUMENT.

The question which is presented in this case calls for a judicial application of Section 7 to underground workers in the bituminous coal mining industry.

The findings of fact show that for many years prior to the enactment of the Fair Labor Standards Act, by custom and usage and agreement, travel time in coal mines has been excluded from the work day of such employees. And until 1943, when in order to procure a general wage increase barred by emergency wage stabilization statutes and policies the United Mine Workers asserted a statutory right to payment for such travel time, the exclusion of such travel time from the work week had been advocated by the union. In 1940 the union and the operators jointly sought a ruling from the Wage and Hour Administrator to permit the exclusion of travel time from the work week under the Fair Labor Standards Act; and after a painstaking and thorough investigation, the Administrator ruled that the statute does not compel the inclusion of travel time in the work week.

However, the Circuit Court of Appeals in this case ruled that the Fair Labor Standards Act compels the inclusion of travel time in the work week—reversing the judgment of the Trial Court. The decision of the Circuit Court of Appeals is based squarely on the conclusion that this Court in the Muscoda case pronounced a legal definition of "work or employment" by which the applicability or non-applicability of Section 7 must be determined in any situation. Thus, the Circuit Court of Appeals reduced the question presented in this case to a simple problem of mensuration; and, while it accepted the findings of fact made by the Trial Court, it held extraneous those facts which the District

Court found distinguished the situation in the bituminous coal mining industry from the situation in the iron ore mining case.

The different judgments of the two courts, therefore, resulted from the Circuit Court's conviction that the decision of this Court in the Muscoda case enunciated a legal formula for the determination of what is, or is not, a part of the statutory work week, and the District Court's concept that no legal formula should be attempted but that each case should be examined and judged in the light of all the facts existing, including custom and usage, agreement between employer and employee, and administrative construction of the Fair Labor Standards Act by the agency charged with its enforcement. We respectfully submit that the approach of the District Court is that which this Court has adopted in performing the duty of applying the law

> "ad hoc, to an infinite variety of complicated industrial situations" *A. B. Kirschbaum* v. *Walling*, *supra*,

and that the Circuit Court of Appeals erred in its determination that the decision of this Court in the Muscoda case should control.

The Court has declared that the colloquial definition of "work or employment" utilized in the Muscoda case has

> "no necessary application to other states of facts" *Armour & Company* v. *Wantock*, *supra*.

In *Skidmore* v. *Swift & Co.*, *supra*, concerning waiting time, the Court declared

> "We have not, and cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court."

See, also, *Walling* v. *Jacksonville Paper Company*, 317 U. S. 564, 572; *Walling* v. *A. H. Belo Corporation*, *supra*.

In approaching the difficult task of applying the Fair Labor Standards Act to the diverse situations confronting it, this Court has been fully conscious that a practical application of the general statutory language which is consonant with the purposes of the law is essential, and that the Court should avoid attempting to define legally those general terms which the Congress deemed it unwise to define.

The Court now has before it a factual situation which is completely different from that which was present in the Muscoda case. It must determine whether underground travel time constitutes a part of the work day in various coal mining occupations. A proper determination must rest upon the facts which prevail in the bituminous coal mining industry.

The employees involved in this case are within the scope of the Fair Labor Standards Act because Section 3(j) provides that

> "an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining . . ."

Their employment in "mining" coal which moves in interstate commerce brings the employees herein within Section 7 of the statute.

The Court here is not faced with the problem of ascertaining whether the occupations in which these employees are employed constitute employment in "any occupation or process necessary to the production" of the coal within the meaning of the last clause of Section 3(j). The issue here is not whether the work performed bears such intimate relation to the production of goods for commerce as to bring the employees within the purview of that clause. Whether the underground travel of bituminous coal miners is "necessary" to the performance of the mining work which constitutes the consideration for which they receive their wages is not relevant to the question before the Court. The Court

must ascertain whether that travel is *part* of the work in the mining occupations in which they are employed and by reason of which they are entitled to the benefits of Section 7 of the Fair Labor Standards Act. That determination necessarily involves a scrutiny of industrial custom and usage and agreements. In an industry in which there exists a clear concept of what activity constitutes work, the determination cannot properly be made by resorting to the common dictionary definitions of "work" or "employment."

The Fair Labor Standards Act was enacted to eradicate specific economic evils and was intended for application to employees in the whole gamut of industrial pursuits. Therefore, the provision regarding maximum hours was couched in general terms. Where, as here, there is an established industrial concept of the "work day" which affords a practical measure of working time necessary for the economic welfare of employers and employees, the general language of a statute should not be held to compel the abolition of that concept in the absence of a clear legislative mandate or conflict with the purposes of the law. And the undisputed existence in the bituminous coal mining industry of a definitive concept of working time which excludes travel time is the primary factor which distinguishes this case from the iron ore mining situation presented to the Court in the Muscoda case. In the latter, the Trial Court found that no custom and usage existed at the time of the passage of the Fair Labor Standards Act which excluded travel time from work time; which finding this Court held was substantiated by the evidence. The finding was predicated upon the following factors:

1. Although existing arrangements provided for eight hours' work daily at the usual working place,

> "This provision carries little weight in establishment of a custom not to pay for travel time, since in practice

no record of the time spent 'at the usual working place' has been kept and it was the exception rather than the rule that a man worked precisely eight hours at such a place. The actual practice under those contracts was for the company to arrange a shift which was supposed to run, by way of example, from 6:45 A.M. to 3:15 P.M. at the usual stations of duty underground, with thirty minutes off for lunch. The men in the working stations closer to the underground man unloading stations would usually actually arrive at their working stations before 6:45 A.M. and start working earlier that 6:45 A.M., the men in the furthest working stations would frequently actually arrive later than 6:45 A.M. Quite generally most of the producing crews left their particular stations before 3:15 P.M. In all cases the men were credited with exactly eight hours work except in every unusual cases, although the time spent" at the usual working place" fluctuated thirty to forty-five minutes per shift as between men. Under these circumstances, regardless of the phraseology of the contracts, the pay was on a shift basis rather than an hourly basis, and since some of the men did not spend a full eight hours at their particular stations, it cannot be categorically stated that they received no compensation for at least part of the time spent by them in traveling to and from their usual stations." 40 F. Supp. 4, 7.

2.

"Prior to the enactment of the Fair Labor Standards Act of 1938, iron ore miners repeatedly made efforts to obtain full, or at least a larger partial, compensation for so-called travel time." 40 F. Supp. 4, 8.

3.

"Even if the mode of payment of these men did clearly exclude such time as employment and workweek time, it could not provide a controlling construction of section 7 of the Act. The evidence clearly establishes that the methods of payment of wages were dictated almost entirely by the employers. The employees worked on the best terms they could obtain and the

fact that they could not obtain terms that would compensate them for time spent in traveling underground to and from their working stations does not indicate that they did not consider that time as working time." 40 F. Supp. 4, 8.

In this case, the Trial Court has found that exactly the opposite conditions exist:

1.

"It does appear here, beyond any question, that travel time has never been considered as, or included in, work time by anyone in the bituminous coal industry in this country. On the contrary, for certainly the past fifty years, the 'face to face' basis has been universally recognized in the bituminous coal industry as the basis for computation of work time." 53 F. Supp. 935, 948.

2.

"Here, we have the word of both the operators and the union that as to the 'face to face' basis, 'this method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years, and is the result of collective bargaining in its complete sense.' " 53 F. Supp. 935, 948.

That no compensation was paid in the bituminous coal mining industry for any part of the time spent in traveling is acknowledged in the Houck letter, quoted by the Trial Court in this case, which states:

"The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual working place. Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898." (R. 670.)

As the Houck letter indicates, however, the necessity for underground traveling to reach places of work has been duly considered in fixing basic wage rates.

Referring to the above findings, the Circuit Court of Appeals remarked:

> "In view of the long established custom in the coal industry not to include travel time in the work week, the collective bargaining contracts extending over a long period recognizing the 'face to face' basis of pay, the testimony before the committees of Congress, the reason and purpose of the Fair Labor Standards Act and the probable effects and consequences of construing the act to require travel time in bituminous coal mines to be included in the work week, there is strong reason for thinking, as everyone connected with the matter seems to have thought until recently, that it was not the intent of Congress that the act should be so construed in its application to the coal mining industry. The reasons in support of this conclusion are fully and ably set forth in the opinion of the learned judge below and need not be repeated. They would be convincing, were it not for the decision of the Supreme Court in *Tennessee Coal Iron & R.R. Co.* v. *Muscoda Local No. 23, etc.* U. S. , 64 S. Ct. 698, which we do not think can be distinguished in principle from the case at bar."

Therefore, it is clear that the Circuit Court of Appeals fully accepted those findings.

Since there was no definitive concept of work time established in the iron ore mining industry at the time the Fair Labor Standards Act was enacted, the Court was compelled to invoke the colloquial definition and apply the term "work" in its broad and common sense.

In the bituminous coal-mining industry, more than forty years prior to the enactment of the Fair Labor Standards Act, employers and employees, prompted by the necessity for finding a practical solution to operating difficulties, adopted a definitive concept of work time. That concept, adhered to without deviation, had attained the status of

custom and usage in the industry when the Congress enacted the Fair Labor Standards Act.[1]

Paraphrasing the language of Mr. Justice Frankfurter's concurring opinion in the Muscoda case:

> Workweek, as applied to workers in the bituminous coal mining industry, had so settled a meaning at the time of the enactment of the Fair Labor Standards Act, as to be deemed incorporated by reference. As a result, "workweek" in this statute, as applied to workers in this industry and on this record, has a technical meaning—that is, a meaning so well known to those in the particular industry as to be applied by courts in enforcing the statute when invoked by men in the industry.

There is nothing in the history of the Fair Labor Standards Act, in its terms, or its purposes, which would indicate any legislative intention to disturb that fixed concept. For many years prior to the enactment of the Fair Labor Standards Act, the problems of the coal mining industry and the working conditions of the miners were the concern of the Congress and other Federal agencies, and the Congress was acutely conscious of the problems of this industry.

When it enacted the leasing Act of February 25, 1920, the Congress took a limited step with respect to the hours of work for underground miners, including coal miners, by establishing a "workday" not exceeding eight hours. Following the passage of that statute, the Secretary of the Interior, the coal mine operators, and the United Mine Workers continued to employ the face-to-face method of computing the "workday" in the bituminous coal mines.

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[1]The Blackstone statement regarding the requisites of a valid custom, which was quoted by this Court in a footnote to the Muscoda decision, states: "it must have been peaceable, and acquiesced in; not subject to contention and dispute. For as customs owe their origin to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting." Commentaries, 77.

The Secretary of the Interior, who was charged with enforcing the limitation, never has challenged the validity of the face-to-face method in regard to coal mining operations subject to the Act of 1920.

When Congress enacted the Fair Labor Standards Act, it must be presumed to have been aware of the eight-hour provision contained in the Act of 1920; and by its silence during the eighteen years during which the Act of 1920 was being administered, it must be presumed to have acquiesced in the construction given to the eight-hour provision.

> "Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 313.

In view of the similarity in the language employed in Section 30 of the Act of 1920 and in Section 7 of the Fair Labor Standards Act, it may reasonably be assumed that when it enacted the Fair Labor Standards Act, Congress did not intend to revoke the custom and usage in which it had tacitly acquiesced under the Act of 1920.

Further evidence that Congress did not intend to revise the established concept of the work day existing in the bituminous coal mining industry at the time the Fair Labor Standards Act was passed is contained in the Bituminous Coal Code of 1933. That code and subsequent modifications thereof were drawn up by the coal operators and the United Mine Workers pursuant to the National Industrial Recovery Act, which provided that industrial codes of fair competition made thereunder

> "shall contain the following provisions . . . (3) that employers shall comply with the maximum hours of labor, minimum rates of pay and other conditions of employment, approved or prescribed by the President." (§7(a))

As we have shown (Ante, P. 23) the Bituminous Coal Code, as amended in 1934, provided for a work day of "seven hours work at the usual working places." Thus, the NRA Code crystallized into law the face-to-face standard of measuring "maximum hours of labor"—the work day and the work week—giving legal sanction to usage and custom in the industry and to preexisting collective agreements.

Congress must be deemed to have been aware of the existence of the Bituminous Coal Code of 1933 and of its major provisions. The National Industrial Recovery Act was a legislative enactment designed to foster the promulgation of codes of fair competition which, as this Court said, were intended by the Congress to have the force and effect of miniature statutes for particular industries.

When Congress enacted the Fair Labor Standards Act, it was fully cognizant that for many years custom and usage in the bituminous coal mining industry had excluded travel time from the work day and work week. That concept of time worked had been contained in many collective-bargaining agreements between the coal operators and the powerful United Mine Workers of America. It had been deemed to comply with a federal statute fixing eight hours as the maximum work day for underground miners in coal mines (which statute was in force during many of the years when such agreements were made), and had been accepted as a proper provision for establishing "maximum hours of labor" under the National Industrial Recovery Act.

We submit that in the light of that background, unless the language of the statute or the intention and purposes of the Congress in enacting the Fair Labor Standards Act unequivocally demand it, Section 7 of the act should not be held to compel the inclusion of travel time in the work week of the bituminous coal miners.

The legislative history of the Fair Labor Standards Act (Ante P. 24) shows that except where necessary to eradicate substandard wages or intolerable hours of labor the Congress did not intend to interfere with the processes of collective bargaining.

Mr. John L. Lewis appeared for the United Mine Workers before the joint hearings conducted by the House Committee and the Senate Committee, and vigorously advocated that the agreements between the coal operators and the United Mine Workers be left unimpaired. And the committee reports and debates on the floors of both Houses show a continuing intention by the Congress not to impair the processes of collective bargaining.

The statute itself declares as its purpose the correction and elimination of

> "labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency and general well being of workers"

without

> "substantially curtailing employment or earning power" (§2)

Nowhere in the legislative history of the statute or in the language of the law itself is there any indication that the Congress intended the statute to abrogate well-established industrial concepts of what constitutes a work week in particular occupations or to compel an *increase* of earnings where not necessary to achieve the objectives of the act.

The statute leaves the term work week undefined. The definition of "employ"—to wit, that it includes to suffer or permit to work—sheds little light on the meaning of the term work week, since the term "work" also is a general term, susceptible of different meanings, and acquires definitive connotations from the environment in which it is used.

As the Circuit Court of Appeals said in the *Muscoda* case:

> "The Congress probably failed to define working time for the same reason that it refrained from attempting to define the regular rate of pay, namely 'because the employment relationships to which the Act would apply were so various and unpredictable.'" On Petition for Rehearing, 137 F. 2d 176, 183.

In applying the statute to the bituminous coal mining industry, the Court should not ignore the environmental characteristics which the terms "work," "workday," and "workweek," have acquired through many years of use and application in the industry.

Concededly, contracts made in violation of a statute are ineffective against the act, and custom and usage cannot prevail against a legislative mandate. Neither agreement nor custom and usage can exclude from the scope of the Fair Labor Standards Act that which the Congress intended to encompass within the terms "work" and "workweek." Those terms, however, are not words of art; and where, as here, through custom and usage and collective-bargaining agreements they have attained certainty of meaning in a particular industry, that meaning should not be revised by judicial construction where neither the language nor the purposes of the statute demand the revision.

In this connection, it is worthy of note that just three years prior to the Fair Labor Standards Act the Congress guaranteed the right of employees to bargain collectively in regard to hours of employment (National Labor Relations Act, Sec. 9). That the determination of hours of employment properly belongs in the realm of collective bargaining was reaffirmed in Sec. 7(b)(1) and (2) of the Fair Labor Standards Act, which provides that employees may be employed for hours in excess of forty per work week, without overtime, if the employment is pursuant to a collective-bargaining agreement guaranteeing and limiting the number of hours of employment in specified periods of time.

The National Labor Relations Act and Section 7(b)(1) and (2) of the Fair Labor Standards Act implicity recognize that when parties fix hours of employment, the agreement must be based on a mutual concept of the activity which constitutes work. Without it a meeting of the minds would be impossible. Therefore, there is nothing in Section 7(b)(1) and (2) which compels rejection of the concept

of work time which has been developed through collective bargaining in order to solve operating problems in the bituminous coal mining industry.

That the economic welfare of the miners impels the exclusion of travel time from the work week in the bituminous coal mining industry is made clear by the Houck letter (in which the coal-mine operators joined with the United Mine Workers) seeking from the Wage and Hour Administrator a ruling permitting maintenance of the custom under the Fair Labor Standards Act. That letter, signed by Mr. Earl Houck on behalf of the United Mine Workers, states:

> "It is urged that any ruling requiring such a change in the custom, tradition and contract provision so as to change the work day from 'seven hours' work in the mines at the usual working places' to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within such mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated." (R. 670)

And it is of major significance that after a painstaking investigation the Wage and Hour Administrator ruled that the face-to-face method of computing work time in the bituminous coal mining industry would not be deemed a violation of Section 7 of the Fair Labor Standards Act.[1]

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[1]The importance the Wage and Hour Administrator has attached to custom and usage and agreement in determining what constitutes time worked within the meaning of Section 7

To this date the ruling of the Wage and Hour Administrator in regard to the face-to-face method of computing work time has remained unchanged, although as the District Court pointed out:

"The Administrator was invited by plaintiff to intervene in this action, of which invitation he must have

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of the Fair Labor Standards Act is apparent from the following:

Interpretative Bulletin No. 13, originally issued July, 1939, and revised November, 1940, "Determination of Hours for which Employees are Entitled to Compensation Under the Fair Labor Standards Act of 1938," provides in part as follows:

> "Inquiries have been received with respect to employees who are required to travel continuously for several days and who perform active labor while traveling. Thus, for example, when cattle or poultry, etc., are sent to market by rail, an employee of the shipper is required to travel on the train in order to water and feed the stock en route. In other cases an employer who ships machinery by train to a distant customer requires an employee to oil the machinery en route and otherwise to see that it arrives in perfect condition. The employee generally rides in the caboose with the train crew. In each of the foregoing cases, the employees are subject to call for 24 hours a day, but time required for active work by such employees would ordinarily be much less. The employee generally has a substantial amount of time for sleeping, eating, relaxation, etc. No precise formula will decide this type of case and any reasonable agreement entered into between the parties or established by custom and usage which takes into account the amount of time required for active labor by the employee and the fact that the employee is subject to call for 24 hours a day, will be respected by this Division in its enforcement policy." (1924 W. H. Man. 126)

and

> "In some cases, however, the employer requests his employees to report for work at a specified hour at the place where the work is to be performed instead of at the employer's place of business. In these cases the employee's working time may be considered to begin at the time he

> been aware, as his Regional Attorney was present in court throughout the trial and also attended the pre-trial conference. I must therefore assume that the Administrator did not wish to retract or modify his ruling of July 1940."

This Court has noted the importance of the Administrator's rulings as an aid to the Court in applying the Fair Labor Standards Act, stating that

> "Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons." *Skidmore* v. *Swift & Co., supra.*

> reports for work, unless the traveling time required in order to reach the place where the productive work is to be performed is unreasonably disproportionate to the normal traveling time required in reporting for work at the headquarters of the employer. No precise formula will solve this type of situation. What is unreasonably disproportionate depends upon the facts in the particular case and reasonable standards agreed upon between the employer and employee will be accepted for the purpose of the Act." (1942 W. H. Man. 126)

Particularly pertinent is the release by the Department of Labor's Assistant Solicitor in Charge of Opinions explaining the difference between a fluctuating and regular work week. Interpretative Bulletin No. 4, "Maximum Hours and Overtime Compensation" lays down the Wage and Hour Division's ruling for computing the regular rate of pay of salaried employees to determine the overtime due them pursuant to Section 7 of the Fair Labor Standards Act, and states:

> "If the employee is on a weekly salary basis, his regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the regular number of hours worked or if no regular number of hours is worked, by the total number of hours worked each week. If the employee works a regular number of hours, the regular hourly rate of pay will be a fixed rate, remaining unchanged from week to week. But if the employee works a fluctuating and not a regular number of hours, his regular hourly rate of pay will be the average hourly

The only reason for holding the travel time of bituminous coal miners to be part of the work week lies in the assumption that when Congress used the terms "work" and "workweek" it attached to them the colloquial dictionary meaning, to be applied inflexibly regardless of circumstances and results. Such an assumption applied to the facts of this case would ignore the long-existing concept of the work week in the bituminous coal industry, which concept has been accepted by employers, employees, and the administrative agencies of the Government charged with enforcing the Fair Labor Standards Act and the Act of February 25, 1920. It would read into the statute an intention on the part of the Congress to impose upon this

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rate for the week and will vary from week to week." (1942 W.H. Man. 106)

In reference to an inquiry regarding the difference between a regular and a fluctuating work week, the Assistant Solicitor stated, in part:

> "In the record-keeping regulations we refer to a regular workweek established by 'agreement or custom.' By agreement we mean, of course, an understanding between employer and employee, either written or oral, which governs the number of hours the employee is expected to work in exchange for his salary. Where no such understanding exists, the number of hours the employee works in exchange for his salary may be fixed by custom and practice. Thus, if an employee works a certain number of hours week after week and variations from that number of hours occur on only infrequent and widely separated occasions, there is in all likelihood a regular workweek established by custom. In other words slight and occasional variations from the regular workweek will not modify the rule. Custom and practice may come into play in another way, however, that is, to modify a regular workweek set by agreement. Thus, if employer and employee agree to a certain number of hours in exchange for a salary but over a substantial period of time the employee customarily works a different number of hours or works a varying number from week to week, such custom and practice may serve to alter the agreement." (1942 W.H. Man. 132)

industry by silence a concept of work time completely different from that known to the Congress to be so well established as to constitute a custom and usage in the full legal sense. And it would inflict irreparable injury upon employers and employees alike.

It is recognized that the hourly wages paid to bituminous coal miners are higher than those paid to most workers in American industry. It is also recognized that their basic hours of work have been shorter than the hours of workers in practically all other major industries in America. (See Houck letter, R. 669) These favorable working conditions have resulted from years of collective bargaining; and the cornerstone of the wage and hour structure thus erected has been the agreement that work time should be measured on the face-to-face basis.

The impracticability of measuring working time in the bituminous coal mining industry by any other method is inherent in the very nature of coal-mining operations. When mines are first opened, the working places are close to the portal of the mine. However, as the coal mines are worked, the working places become farther and farther removed from the entrance to the mine. To include travel time from the portal of the mine to the usual working places as work time, therefore, would establish

> "such diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated." (Houck letter, R. 670)

The older mines, with travel time running several hours a day, would be compelled to reduce wage scales in order to compete with those coal mines paying for less travel time. In individual mines wage rates would have to be adjusted to give consideration to the distance from the portal. In short, the added labor cost factor imposed in varying degrees upon each mine and as between mines, not only would make impossible the establishment of wage scales and hours

of work by collective agreement, but would create competitive conditions threatening the existence of many coal mines. In contravention of the expressed policy of the Fair Labor Standards Act, it would inevitably curtail employment and the earning power of many of the miners. (See §2, Fair Labor Standards Act).

Many bituminous coal mines are operated in states which have enacted laws defining the workday in mining. The face-to-face method of computing working time has been accepted as proper under those statutes. However, should travel time be declared to be work time by reason of the Fair Labor Standards Act, it is reasonable to assume that it would be ruled to be work time within the meaning of those statutes.

Such rulings would restrict the productive operations of some miners with substantial periods of travel time to approximately five hours per day. That curtailment of production, with other increased costs per ton because of the compulsory payment for travel time, would place some mines in a hopeless competitive position. The wages and earning power of employees in such mines would be drastically curtailed, and a substantial portion of the industry might be forced to cease operations.

This Court has taken judicial notice of the competitive conditions normally existing in the bituminous coal mining industry in peace times:

> "For a generation there have been various manifestations of incessant demand for Federal intervention in the coal industry. The investigations preceding the 1935 and 1937 Acts are replete with an exposition of the conditions which have beset that industry. Official and private records give eloquent testimony to the statement of Mr. Justice Cardozo in the Carter Case (p. 330) that free competition had been 'degraded into anarchy' in the bituminous coal industry. Overproduction and savage, competitive warfare wasted the industry. Labor and capital alike were the victims. Financial distress among operators and acute poverty

among miners prevailed even during periods of general prosperity. This history of the bituminous coal industry is written in blood as well as in ink." *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 395.

"The evidence leaves no doubt of the existence of the evils at which defendants' plan was aimed. The industry was in distress. It suffered from over-expansion and from a serious relative decline through the growing use of substitute fuels. It was afflicted by injurious practices within itself,—practices which demanded correction. If evil conditions could not be entirely cured, they at least might be alleviated. The unfortunate state of the industry would not justify any attempt unduly to restrain competition or to monopolize, but the existing situation prompted defendants to make, and the statute did not preclude them from making, an honest effort to remove abuses, to make competition fairer, and thus to promote the essential interests of commerce. The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry." *Appalachian Coals* v. *United States*, 288 U. S. 344, 372.

A decision interpreting Section 7 of the Fair Labor Standards Act as compelling the inclusion of travel time in the work week would aggravate the very competitive conditions which this Court has deplored and which the Congress has acted to alleviate. The resultant operating difficulties and the substantial liability for back wages which would be imposed upon the coal operators would tend to create lower wages and unemployment.[1] The wage and hour standards

[1] In passing, it should be noted that such a decision also would require a revision of the Wage and Hour Administrator's regulations defining an employee engaged in an executive capacity for the purposes of applying the exemption contained in Sec 13 (a) (1) of the Fair Labor Standards Act. That regulation now enunciates several criteria for determining an employee's status. One criterion states an executive employee is one "whose hours of work of the same nature as

prevailing for employees in the bituminous coal mining industry thus would be lowered by a statute which was enacted to foster improved working conditions. The face-to-face method of computing work time has provided a satisfactory solution to a vexatious problem inherent in coal mining. Its abolition by judicial action would restore the problem and destroy the solution, without benefit to the employees.

The District Court properly noted that

> "The bituminous coal industry is *sui generis*. Its problems have been before Congress for many years. It is one of the few industries, for the regulation of which special Acts of Congress have been passed such as the two Guffey Acts. It is a highly competitive industry. Not only is there competition between the individual coal operators; there is competition between the northern operators and the southern operators, and always there is the sharpest kind of competition between the producers of bituminous coal and the producers of other fuels such as oil and gas. These conditions and many others are important factors which must be regarded in making up a wage structure for the bituminous coal industry. And in this industry, the wage structure is of peculiar importance because the cost of labor makes up approximately two-thirds of the cost of the production of coal. Of course, the Fair Labor Standards Act applies to the bituminous coal industry, as it applies to all interstate industry,

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that performed by non-exempt employees do not exceed twenty percent of the number of hours worked in the workweek by the nonexempt employees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment." (Reg., Part 541, §541.1) Many supervisory employees in coal mines now deemed within the executive exemption engage in the same amount of travel as the employees they supervise.. Where such travel time exceeds twenty per cent of the weekly hours of work, and in some mines it does, such supervisory employees would no longer qualify. *Executive status for such employees would depend upon the distance from the portal at which the work.*

but in situations not precisely covered by the language of the Act, its legislative history, as well as all the facts and circumstances, should be examined." 53 F. Supp. 935, 942 (R. 554).

Examination of the facts in this case compels the conclusion that the travel time of the miners is not made part of their work week by force of the Fair Labor Standards Act; and that the face-to-face method of computing work time complies with the requirements of the law.

This conclusion, which respects and preserves custom and usage and agreement in the industry, leaves the question of pay for travel time in the only area where it can reasonably and practically be resolved—namely, in the area of collective bargaining. We submit that in the light of all the relevant facts existing in the bituminous coal mining industry, it is the only conclusion which is consistent with the intention of Congress in passing the Fair Labor Standards Act.

Respectfully submitted,

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February 12, 1945

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 721

JEWELL RIDGE COAL CORPORATION, a Corporation, *Petitioner*,

v.

LOCAL No. 6167, UNITED MINE WORKERS OF AMERICA etc., et al., *Respondents*.

PETITION FOR REHEARING

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LOCAL No. 6167, UNITED MINE WORKERS OF AMERICA etc., et al., *Respondents*.

PETITION FOR REHEARING

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Jewell Ridge Coal Corporation, respectfully prays that the Court will rehear the judgment entered by it herein on the 7th day of May, 1945, affirming a judgment entered herein by the Circuit Court of Appeals for the Fourth Circuit on the 6th day of October, 1944, and that upon such rehearing it will reverse said judgment of the Circuit Court of Appeals for the Fourth Circuit.

All italics are petitioner's unless otherwise noted.

For brevity, the Fair Labor Standards Act of 1938, 52 Statutes at Large 1060-9, 29 U.S. C.A. 201-219, will be called the Act; the Administrator of the Wage and Hour Division of the United States Department of Labor will be called the Ad-

ministrator; International Union, United Mine Workers of America, will be called the Union; and the case of **Tennessee Coal, Iron & Railroad Co. v Muscoda Local No. 123, etc.**, will be called the Tennessee Case.

The grounds of this petition are as follows:

I. There is a Question as to the Qualification of His Honor Mr. Justice Black to Take Part in the Consideration and Decision of the Cause.

His Honor Mr. Justice Black took part in the consideration and decision of this cause. It appears to us that a question may exist whether he was so situated as to be in position to administer impartial justice in this the Court of ultimate resort, by reason of his connection with (1) the subject matter of the cause and (2) the chief counsel for the respondents.

1. The purpose of this action is to interpret, as applicable to the bituminous coal mining industry, certain terms of the Fair Labor Standards Act of 1938, 52 Stat. 1060-9, 29 U.S.C.A. 201-9, which are not expressly defined in the act. To that end the Court found it necessary to resort, *inter alia*, as shown by the text of the opinions, to the legislative history of the Act. Mr. Justice Black's connection therewith is as follows:

(a) On May 24, 1937, Mr. Justice Black, then a member of the United States Senate, introduced a bill (S. 2474) to provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes. This bill was referred to the Senate Committee on Education and Labor, of which Mr. Justice Black was chairman. On July 6, 1937, he, for the committee, submitted a report (Report No. 884) to accompany S. 2474, which report dealt with the public hearings held by the committee jointly with the House Committee on Labor, discussed the testimony presented,

proposed certain modifications, and reported favorably an amended bill in the nature of a substitute. The record of the proceedings indicates that Mr. Justice Black was the most active and prominent sponsor of the bill in the senate, both in committee and on the floor, until his appointment to this Court. He made statements pertinent to the issue here presented, which were reported in the Congressional Record, and which this Court found it necessary to interpret in deciding the cause—"Such general remarks, when read fairly and in the light of their true context, were obviously not made with this narrow issue in mind * * *" (pp. 5-6 and footnote). *He participated in this Court's consideration and interpretation of his statements.*

(b) There is a question whether one so intimately situated in relation to the origin and development of the legislation, and of necessity influenced by many personal recollections, impressions, and predilections *dehors* the record, is in position to judge with appropriate detachment the recorded history, in which he himself was one of the actors. That alone is available to the parties for briefing and argument and to the other members of the Court for consideration.

2. His connection with Crampton Harris, Esq., chief counsel for the respondents has been as follows:

(a) He was for a number of years associated with Mr. Harris as partner in the practice of law at Birmingham, Alabama, under the firm name of Black and Harris. The partership terminated in 1927 when Mr. Justice Black took his seat in the United States Senate.

(b) In 1935 Mr. Justice Black was appointed chairman of the Special Committee of the United States Senate to investigate Lobbying Activities. Mr. Harris was appointed committee counsel.

(c) Mr. Justice Black, as chairman of the above-mentioned special committee, was one of the defendants in an injunction suit instituted in the District Court of the United States for the District of Columbia under the style of **Hearst vs. Black.** The plaintiff, upon an adverse result in the District Court, carried the case to the United States Court of Appeals for the District of Columbia, where it was decided November 9, 1936 (**Hearst vs. Black**, 87 F. 2d 68). Mr. Harris was sole counsel appearing for the defendants.

3. Petitioner suggests that if Mr. Justice Black's position of impartiality was, or may reasonably have been, impaired in consequence of the above stated facts, a rehearing of the cause is the proper remedy.

II. The Court, in Stating Certain of the Facts of Underground Travel, Overlooked Portions of the Record Establishing the Contrary.

The Court, on pages 2-4 of the opinion, states the facts of underground travel upon which it relied in reaching its decision. But it overlooked portions of the record which clearly establish the contrary in certain important instances.

1. The Hazards Incident to Travel on the Mantrips Are Not Due to Rockfalls.

The opinion shows that the Court was strongly impressed with the idea that the mantrips are operated under a roof from which rocks continually fall to the grave peril of those passing beneath. The Court said:

> "The dangers of falling slate and falling ceilings are **ever present** (p. 2) . . . The record shows that six persons suffered compensable injuries, involving absence from work for seven days or more while riding on petitioner's mantrips from January 1, 1939, to October 31, 1943.

> There is also evidence of **two deaths** and numerous minor injuries to the miners (pp. 2-3) . . . . . From the moment they enter the portal until they leave, they are subjected to **constant** hazards and dangers; they are left **begrimed and exhausted** by their **continuous** physical and mental exertion" (p. 4).

The Court assumes that the presence of hazard in travel is a badge of work on the part of the traveler. Adopting that assumption, we are sure that we can demonstrate beyond question that the Court's impression that the mantrips are in constant peril from rockfalls is erroneous. The Court became confused between the conditions on the "main line" or "main haulage ways," where the mantrips are operated, and those in the other portions of the mines where the work of extracting coal is actively proceeding. In the latter areas there is danger from rockfalls as an incident to the active mining, but the mantrips are not operated in such areas. On the "main haulage ways" mining operations have been long since concluded, while the continuous flow of traffic makes these ways subject to the constant inspection of all the employees, in addition to the daily official inspections (R. 509). We feel safe in asserting on the basis of the record evidence that the traveler along a "main haulage way" is as safe from a rockfall as he would be in a railway tunnel or in any cavern to which the public resort without a thought of danger from the roof. It is true that employees riding the mantrips occasionally (though very rarely) suffer injuries. But these injuries do not result from rockfalls. They are incident to the fact that the employees are riding in moving vehicles, and are such as would equally occur if only the sky were overhead.

The confusion in which the Court fell upon this point was due to the continual effort of the respondents, in presenting their evidence and their arguments, to play up the general

hazards of coal mining, without restricting themselves to the hazards of travel on the "main line." Witness, in addition to their testimony and exhibits on this subject, Appendices 2, 3 and 4 to their brief (pp. 22-4), stating the number of "Coal Mine Accidents in the United States" in certain periods.

These "main line" haulways "are the most safest haulage that we have" (R. 509-510); "they would be the most safe, they are the most safest" (R. 520). A striking corroboration of this general testimony is found in the evidence as to specific instances. **The record fails to establish that a single injury to employees riding a mantrip has ever occurred in petitioner's mines in consequence of a rockfall.** A tabulation was made of all compensable injuries, six in number, occurring between January 1, 1939, and October 31, 1943, a period of nearly five years (Ex. 45, R. 527, 807-9). It showed that all the injuries were due to wrecks or other like misadventures relative to the operation of wheeled vehicles. This testimony, and other items to the same effect, was accepted by the District Court, and his findings thereon are final under Rule 52.

It is true that the respondents, in addition to confusing the general hazards of coal mining with those of the mantrips, introduced evidence of two fatal accidents (R. 384) which were claimed by hearsay to have occurred on a mantrip (R. 390), but the company's records showed that these two fatalities did not occur on a mantrip and were due, not to a rockfall, but to a head-on collision (R. 526). The Court was doubtless led to its mention of "two deaths" (p. 3) as having occurred on mantrips by the statement to that effect in the brief for respondents (Br. p. 9). But it is clear that on the conflict of testimony, the District Court's findings are conclusive.

This Court stressed the hazard of falling rocks as distinguishing travel by mantrip from surface travel, and as

lending to the former the character of work. Is it not too plain for argument that the Court was misled as to this feature? Is it not equally plain that such hazards as apply to the mantrips apply essentially to all wheeled traffic, and have little or no causal relationship to the fact that these vehicles run beneath the surface?

As for the considerable number of employees who enter the mines on foot without resort to the mantrips, it is most significant, and fully corroborative of what has just been said, that the record fails to disclose a single injury to have been sustained by these pedestrians. Obviously if "the dangers of falling slate and falling ceilings are ever present" as the Court supposed, some of these employees must have suffered injury thereby.

2. There is No Essential Difference, so Far as Mental and Physical Exertion are Concerned, between the Highway Travel and the Travel by Mantrip.

In stating the facts distinguishing the employee travel between home and portal from that between portal and working place, the Court continued to confuse the incidents of travel on the mantrips with those of active mining operations in the working places. The Court said (p. 4):

> "Those who are forced to travel in underground mines in order to earn their livelihood are unlike the ordinary traveler or the ordinary workman on his way to work. They must journey beneath the crust of the earth, far removed from the fresh and open air and from the beneficial rays of the sun. A heavy toll is exacted from those whose lot it is to ride and walk and mine beneath the surface. From the moment they enter the portal until they leave, they are subjected to constant hazards and dangers; they are left begrimed and exhausted by their continuous physical and mental exertion."

About two-thirds (R. 243, 245) of petitioner's employees travel from their homes to the mines by highway over mountain roads in motor vehicles over distances ranging up to thirty-six miles each way (Ex. 28, R. 244, 707). It is a matter of common knowledge that such travel is attended by definite hazard and is accompanied by occasional injuries to the travelers, some of which are serious, in fact much more serious than any which attended the travel by mantrip in petitioner's mines. It is also attended by definite hardships due to the weather, the state of the highway, and the character of the vehicle. The District Court comparing the two modes of travel justifiably stated that if petitioner's employees ought to be paid for the travel by mantrip, it might

> "also be contended that they are entitled to pay for the time spent in travel from the points where they board the trucks and buses to the mines" (53 F. Supp. 949, app. pet. 75).

There is, of course, some difference between the travel of the employees by highway and the travel by mantrip, but the difference is not fundamental. The travel is "the same sort of thing." In each case, the means are wheeled vehicles, and the purpose is to enable the employee to report for his work at the place and hour fixed therefor.

This Court in stating that the mantrip travel is "far removed from the fresh and open air," overlooked the uncontradicted testimony that the air on the "main line" is always fresh and agreeable, supplied by numerous power fans, some of which are of very great size, delivering "around 15,000 feet of air a minute" (R. 92), and providing a greater circulation than the law requires (R. 93). It is true that there was some complaint of odors in some of the working places, but respondent's witness admitted that no such complaint was applicable to the mantrips (R. 438). The Court's impression that the air on the mantrips

is not "fresh" is another instance of confusing conditions on the mantrips with conditions in the working places.

In speaking of the plight of "those whose lot it is to ride and walk and mine beneath the surface," the Court is very obviously confusing the time spent in travel and the time spent in mining operations. The latter item is not an issue in this cause. That the active work of mining coal in the working places subjects the workers to "hazards and dangers" and leaves them "begrimed and exhausted" may be conceded. It may be that the work involves "physical and mental exertion" which might perhaps be described as "continuous", and that it exacts "a heavy toll". But the record does not in any wise justify the application of these terms to travel on the mantrips. The only "physical and mental exertion" which is suggested is keeping the head down sufficiently low to insure it against striking low places in the roof. Since the employees must soon learn by experience how low that is, there is certainly no physical or mental exertion involved in assuming and maintaining that attitude. The employees have no duties to perform and no outlook to keep. There is obviously nothing about maintaining their position in the car which is calculated to "exert a heavy toll" or to "exhaust" them. No witness claimed that the ride was 'exhausting', and on the contrary there was positive evidence that riding a mantrip is not more laborious than "sitting in that chair" (R. 164). The findings of the District Court are fully supported by the evidence on this feature. The record does not even support the idea that the employees become "begrimed" on the mantrip. The testimony is clear and uncontradicted that "there is never any dust that amounts to anything collects back there" (R. 94) on the "main line". Is it not plain that the Court received a mistaken impression from the confusion fostered by the respondents in this phase of the case?

Does it not then follow that the Court's impression of fundamental differences between the automobile travel and the mantrip travel is a mistaken one? The miner who is driving his automobile to work is certainly subjected to greater and more continous physical and mental exertion than the rider on the mantrip. Even the other occupants of the automobile are not relieved from the obligation to look out for approaching cars, trains and other dangers of the highway. A loose bench in a boarded up truck is not apt to be either safer or more comfortable than a seat in a mantrip. While the operation of the mantrips displays a human absence of perfection, resulting on rare occasions in collisions, mechanical failures, or other such mishaps, the injuries caused thereby are not shown to be greater than, or even as great as, those which attend automobile traffic on the highways. Even the fact that the mantrips are operated "far removed from the beneficial rays of the sun," as the Court states it, is not an unmixed hardship. There are numerous days on the highways when the sun does not shine and when rain or snow or ice, excessively high or low temperatures, cause the traveler to welcome the portal of the mine where he is sheltered from the elements and where the temperature is always uniform (R. 94). The mantrip may suffer a rare derailment or collision, like any other railway, but it is not subject to skidding on wet or icy roads.

3. The Travel On Foot From the Man Station to the Working Place is a Minor Item and is Not as Onerous as the Court Supposed.

The mantrip station is always located in the "section" as near as practicable to the working places of the employees who dismount there, and consequently the walk to the working place ordinarily involves an insignificant part of the travel time. Several witnesses testified to the length of this walk in their

particular cases, and it appears rarely to exceed two or three hundred yards. The Court was misled in supposing that the miners "collect their tools * * * and carry them on foot to the working places" (p. 3). The coal loaders, who constitute the great majority of the underground employees always leave their tools in their working places (R. 101). Many of the "company men" do the same (R. 444, 476). A miner may have to take a tool out for repair on rare occasions, and only in that event does he carry it in or out.

The Court was of the impression that the short walk from the man station to the working places is "through dark and dangerous tunnels" (p. 3). This walk is lighted by the electric lamps which the men carry on their heads and which necessarily provide ample illumination for walking, since they also provide sufficient light for all the processes of underground mining (R. 221).

4. The Supervision to Which the Miners are Subject on the Mantrips is not That of the Petitioner, but of the State.

The Court adopts the thesis that the employees traveling on the mantrips are under orders and are therefore to be deemed as at work. The Court says (p. 3):

> "A company foreman rides on each mantrip and occasionally gives work instructions during the journey. He also compels compliance with numerous safety rules for mantrips **adopted by petitioner** in compliance with state law. Lay-off or discharge may result from a miner's continued failure to obey these rules."

With regard to the foreman giving "work instructions during the journey", the Court overlooked the findings of the Dis-

trict Court and the uncontradicted testimony as to this item, and clearly reached a wholly mistaken impression. The record shows that these "work instructions", first, were given rarely and casually, and, second, did not relate in any wise to any "work" to be performed by the particular employee on the mantrip during the period of the travel. The testimony showed that a foreman, casually riding next to a particular employee on the mantrip and casually thinking of some feature relative to duties to be performed by this employee after his arrival at his working place, might take advantage of this opportunity to mention the matter to the employee. Such occurrences were purely casual and exceptional. The mantrip was not used either in theory or in practice to provide an opportunity for the foreman to give "work instructions" to the men. The uncontradicted testimony on this point is:

> "Q. 227 . Do the section foremen ever give any instructions to the men about the day's work while riding on that mantrip? A. Not necessarily. They tell a man anytime, may tell him at home or in the evening something he might do when he gets to his working place * * * he might tell him anywhere * * * they can't give a man many orders about a working place until they get in the place. Practically all the orders given to a coal loader are given in the working place" (R. 266-7).

One of the witnesses for the respondents gave the following testimony on this point:

> "Q. 8 That's for work for them to do when they get to the place where they are going to work? A. Yes, sir. He will tell you when you are going in on the mantrip what he wants done up in that place * * If he is sitting in the car beside you and he has something he wants you to do, he will tell you * * * Q. 6 If he sees you outside and thinks of something he wants you to do, he will tell you then, too, won't he? A. Yes sir."
> (R. 475-6).

The findings of the District Court clearly were fully supported:

> "Such instances are rare, as instructions are ordinarily and customarily given at the working place. No work or labor is required of the employees while riding on mantrips * *" (53 F. Supp. 939, app. pet. 49).

Is it not plain that this Court cannot logically regard as work the casual and exceptional receiving of such instructions on the mantrips unless it also regards as work the similar receiving of such instructions "at home or in the evening" or on the highway or on any other such casual occasion? This Court would not have mentioned this item unless it had given it weight. The Court must necessarily have been misled by the following statement in the brief for respondents:

> "He (the foreman) sometimes gives work instructions during the ride" (Br. 8).

With regard to the statement of this Court that the foreman "also compels compliance with the numerous safety rules for mantrips adopted by petitioner in compliance with state law," this is surely not a matter as to which the petitioner has any discretion whatever. **The law requires petitioner to discharge this function.**

The Virginia Mining Laws provide (Sec. 1887g):

> "Nothing in this chapter shall be so construed as to relieve the mine owner or operator from seeing that all of the provisions of this chapter are strictly complied with, nor from the duty imposed at common law to secure the reasonable safety of their employees . . . "

It is perfectly plain that the employees, in obeying the safety regulations imposed by law, are complying with the orders, not of petitioner, but of the state. It is also plain from a con-

sideration of the text of the safety regulations relative to the conduct of employees on mantrips (R. 493-4) that they were framed solely for the purpose of securing the safety of the employees in transit and with a single view to their interest.

Similarly the fact that the drivers of the company's vehicles which convey many of the employees from their homes to the mines, comply with the traffic laws and require compliance therewith by their passengers, would require that this travel be included within the workweek.

The Court says (p. 3):

> "Both the mantrip transportation and travel by foot * * occur only as and when required by petitioner * * * Definite schedules are arranged and maintained by petitioner."

The fact that the mantrips run on definite schedules fixed by petitioner does not, we submit, logically support a conclusion that the riders are under petitioner's orders and thereby at work. It is true that the mantrips run on schedules so arranged as to enable each miner to reach his working place at the time when he is required to report for work there. But the same applies to the travel by highway in the company's trucks and buses. The employee must leave his home at such an hour as will enable him to report for work on time. He would not report on time if he missed the mantrip and neither would he get to work on time if he left his home too late to catch the bus. The men who walk in to their working places must start in time similarly. But the fact that petitioner fixes a definite hour for work to start could not thereby characterize as work the time consumed by the employees in advance activities and movements directed to arriving at the place of work at the time therefor. If that were true, all the time of all industrial

employees from the moment of the sounding of the morning alarm clock would be included within the workweek.

Surely on reconsideration the Court will determine that it was misled in its first impression that compliance with the safety regulations and with the schedules of mantrips is a badge of work.

5. The Employees Ride the Mantrips for Purposes and Interests of Their Own, as Well as of Petitioner.

The Court said that:

> ". . . . the underground travel is undertaken necessarily and primarily for the benefit of petitioner . . . . Without such travel the coal could not be mined." (p. 4).

It does not logically follow from the fact that the coal cannot be mined unless the employees arrive at their working places, that the employees have no interest of their own in arriving there and derive no benefit therefrom. It is true that "the extraction of coal from the mines . . . is the prime purpose of petitioner's business," but surely it is equally true that the extraction of the coal is the prime purpose of the business of the employees, and that without such travel they could not engage in that business. They work in the coal mines because they wish to do so, and they earn their livelihood therefrom. The District Court found as a fact that riding the mantrips "constitutes a benefit both to employer and employee" (53 F. Supp. 939, app. pet. 48), from which it follows that an employee is there acting in his own interest as well as in that of petitioner. If this were not true, precisely the same argument would apply to the highway travel of the employees from their homes—"without such travel the coal could not be mined."

6. The Court was Confused or Misled as to the Facts.

We earnestly suggest that the record does not support the facts which the Court has stated as the basis of its conclusion

that the underground travel of the employees to their working places "bears all the indicia of work" (p. 2), and that the Court was confused or misled with reference thereto. As to means, such travel differs only in non-essential particulars from the highway travel which precedes it, and differs not at all as to purpose, which is that the employee may arrive at work on time.

III. The Court Overlooked the Importance of the Distinction Between This Cause and the Tennessee Coal Case with Respect to the Place of Reporting for Work.

In this cause the only requirement of the employees as to where and when they shall report for work is that they be at their working places at the beginning of the shift (R. 96, 97, 100, 113, 218). The District Court so found as a fact—"all plaintiff's employees are required to be at their places of work for the morning shift at 8:00 A. M." (53 F. Supp. 938, app. pet. 46). In the **Tennessee Coal** case the place for reporting was at "the tally house near the mine entrance or portal" (88 L. Ed. adv. ops. 613, app. pet. 134).

The Court says in the present cause that the two practices "differ inconsequentially" (p. 3).

The Court overlooked the fact that in the **Tennessee Coal** case the Court relied upon a line of decisions under the Federal Hours of Service Act of 1907 which held that **when an employee has reported for work,** waiting time **thereafter** is work time. The leading case of the group is **Missouri K. & T. Railway Company v. United States,** 231 U. S. 112, 119, which was followed by this Court in the **Tennessee Coal** case. The employees in question were members of a train crew, whose train had com-

pleted part of its trip and was then involved in a delay. It was there said by Mr. Justice Holmes:

> "One of the delays was while the engine was sent off for water and repairs. In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period, and that if it be deducted, they were not kept more than sixteen hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were none the less on duty when inactive. Their duty was to stand and wait. **United States v. Chicago, M. & P. S. R. Co.** 197 Fed. 624, 628; **United States v. Denver & R. G. R. Co.** 197 Fed. 629."

In this group of cases the question whether or not the particular employees had reported for work was considered decisive. Is not the Court now inconsistent in stating that this question is "inconsequential"?

IV. The Court Has Failed to Consider, Upon the Present Issue, the Opinion of the Persons Best Qualified to Judge.

The Court does not refer in the opinion to the conferences between the Administrator on one hand and the representatives of the Union and of the employers on the other which over a period of months in the year 1940 preceded the Administrator's ruling that the Act does not require the inclusion of this travel in the workweek. We urge most earnestly upon the Court's attention the fact that the leaders of the Union and their legal advisers, together with the representatives of the employers (thus including all the persons who are surely best qualified to know), presented verbally to the Administrator on various occasions, and finally joined in framing and subscribing a written statement to him, that

> ". . . travel time was never considered as part of the agreement or obligation of the employer to pay for in

> this industry, nor as hours worked by the employees, and this has been the case since the 8-hour day was established in the industry—April 1, 1898" (Houck Letter, 53 F. Supp. 952, app. pet. 78).

The Houck Letter is not mentioned by the Court and thus was not accorded weight. But it was the product of a series of conferences between the industry and the Administrator extending over a period of months. The representatives of the Union in these conferences included the president, two successive general counsel, and other leading officials (R. 138-141, 187-8). The representatives of the employers included several of the most prominent and experienced members of that group. From the outset, there was never the slightest difference between any of them upon the present point. They were completely familiar with all the practices and did not find in them those indicia of work by which the Court undertakes to support its decision. Their purpose was to satisfy and convince the Administrator of the correctness and reasonableness of their definition of the workweek, and they did so. The Houck Letter was the act of the entire group and accurately stated the facts and reflected the consensus (R. 142, 187, 190). To all of this, and to the great mass of other evidence in the record showing that all persons in the industry were in agreement that this travel time was not work time (a situation which continued until August 1943), the Court has given no consideration. We urge that it ought to be considered, and accorded compelling weight.

Surely it is obvious that upon such a question of fact as this, the unaminous belief of the most experienced and clear-headed persons, in the industry, both employees and employers, is entitled to some consideration. Surely the concept, "work", in the coal mining industry cannot be so abstruce and so transcendental that it cannot be grasped by such persons engaged

in that industry and having a life-long experience therein. Surely there is nothing to show that it was the congressional intention in the Act that this word should be understood and applied by the courts in a different sense from that in which it is understood and used by the persons engaged in the industry. Surely when these persons tell the Court, with a unanimous voice, that the underground travel is not work, that should settle the question for present purposes. How can the Court be justified in ignoring such a record?

V. The Practice as to Payment For Travel Time in Foreign Countries is Inconclusive Here.

The Court says that

> "the wide-spread practice in coal producing nations . . . . further bears out the conclusion that underground travel is work" (footnote p. 7).

We suggest to the Court that this inference is not entitled to weight. The record presents nothing approaching a study of the practice in foreign countries in this respect, nor of the general practices and conditions of coal mining there (R. 327). It is just as likely that the major foreign practice is contra. But however that may be, it is surely inadmissible to argue that foreign opinion on the point, based upon conditions of work and bases of pay obtaining in foreign mines, is superior to that of the persons best qualified to judge here at home based upon home conditions. Certainly it cannot be said that travel time is paid for in foreign countries by virtue of any statute similar to our Act or any authoritative interpretation that such travel time is work time. In this country, too, agreement has been reached through collective bargaining to pay for travel time, but neither such voluntary agreement nor any similar practice in foreign countries is relevant to judicial interpretation of the Act.

VI. The Court Failed to Consider the Legislative History of Congressional Efforts to Stabilize Competitive Conditions in the Industry.

The present decision undoes the labors of Congress (1st and 2nd Bituminous Coal Acts) and of this Court (Appalachian Coals vs. United States, 288 U.S. 344) to stabilize normal competitive conditons in the industry. There is nothing whatever in the legislative history of the Act supporting an inference that Congress intended the Act to conflict with the purposes of the Bituminous Coal Act of 1937 (50 Stat. 72, 15 U.S.C.A., Sec. 828ff.) In the absence of ground for such an inference, ought not the Act to be construed harmoniously with the Coal Act? The two enactments were almost contemporaneous.

This Court, in the **Tennessee Coal Case**, stressed the "remedial and humanitarian" purposes of the Act. The Court has the word of the employees and the employers alike that under normal competitive conditions (which will inevitably return at the end of the war) the effect of the present decision

> "would create so much confusion in the bituminous industry as to result in complete chaos and would probably result in a complete stoppage of work at practically all of the coal mines in the United States" (Houck Letter 53 F. Supp. 952, app. pet. 78).

Such a result is surely not "remedial and humanitarian." In the **Tennessee Coal Case** this Court made a remedial decision based in considerable part on the redress of impositions upon a weak and ineffectual Union. Here there is shown no imposition, no wrong in the eyes of the Union and no occasion to assist the bargaining agent in realizing for its members all benefits provided by the Act. In this case there are absent those "humanitarian" considerations which so largely moved

the Court to its conclusion in the **Tennessee Coal Case**, and yet the Court applies that decision and the definition it there formulated to this case nowithstanding the lack of factual support in this record for grounds emphasized by the Court as prominent among its reasons for arriving at the earlier decision. It is submitted that while employees should not be penalized for having a strong bargaining agent, a realistic view of the case compels the conclusion that practical men know when they are "at work." And a strong Union stands to lose more by curtailed scope of the bargaining area than it can gain by an artificial definition claimed for a temporary advantage.

The Court says that by reason of the present decision, "thus shall each of petitioner's miners receive his own reward according to his own labor" (p. 7). But this effect does not logically follow in view of the basis of stabilization of the industry over a long period of history through uniform wage rates and area freight rates. This equalized, for example, the earnings opportunity of the coal loaders, "so that in the exercise of the day's work they would get the same yield of production as the miner in the next mine from them" (R. 147-8). Under the present decision the coal loaders lose their previous equality of earnings opportunity.

> "A man working in a place near the driftmouth where he would have very little travel time would be loading coal and have some advantage over the man who has to ride a long way and would only get to work probably seven hours a day, while the man at the place that is close might get to work eight hours a day" (R. 242).

The fact cannot be ignored that the majority element, the key men in the production of coal, are piece-workers whose earnings vary directly with their hours of work at the

face of the coal. Payment for these miners on the piece-work basis has immemorially been acceptable to them as evidenced by the long succession of collective bargaining agreements. There is nothing in the Act, or in its legislative history, to indicate that it was the Congressional intention, to remove this basis from the field of collective bargaining and to strike down as unfair the piece-work system so long obtaining. Unless such was the Congressional intention, it is difficult to see how an effort by this Court to alter an essential practice in the industry, by forcing it into the mold of an artificial definition absent alike from the Act and from the long succession of collective bargaining agreements, can be other than a great disservice to these employees.

And aside from the piece-workers, under this decision the "company man" who rides the mantrip without duty or responsibility, receives precisely the same pay as the motorman and brakeman who operate the equipment in which he rides. Surely one or the other of these is not "receiving his own reward according to his own labor."

VII. The Decision Contains Elements of Essential Injustice Which the Court Has Not Considered.

The Court's opinion does not deal with the Union's reversal of position and the consequent unconscionable effects visited upon petitioner by the decision. We urge the Court to consider that petitioner entered into the various collective bargaining agreements with the Union in good faith and in reliance upon the position which the Union had consistently held from the time when the Act was first introduced in Congress in 1936, and had publicly maintained in the Houck Letter. It cannot for a moment possibly be doubted or questioned on this record that the Union's reversal and repudiation of that position was

made, not because of any change of its conviction upon the point in issue, but purely for its financial profit. To permit the Union to succeed in such circumstances is to violate the basic principle of justice that "no man shall profit by his own wrong." And "this maxim is far more than a mere banality", as was recently said by Mr. Justice Murphy speaking for this Court of a related fundamental, **Precision Instrument Manufacturing Company vs. Automotive Maintenance Machinery Company**, No. 377, decided April 23, 1945.

If the Union's present position had been taken at the time the contracts here involved were negotiated, petitioner could, and doubtless would, have protected itself against the large accrued liability with which it is now burdened by the decision. For example, the agreement of April 1, 1941, expiring March 30, 1943, provided a 25% wage increase on the face-to-face basis (Ex. 10, R. 51, 294), within which there was ample latitude for protection against the present demands. This agreement was extended by agreement of the parties to May 1, 1943 (Ex. 30, R. 299, 709), was further extended to May 31 (Ex. 34 A. R. 303, 717-8)—"we are requesting our membership to continue at work **under the existing retroactive extended agreement** until midnight May 31." The agreement was then further extended to June 20 (R. 304).

The Union has stated in its brief that it disclaims its rights to pecuniary recovery under the Act except "for the 8 pay periods from April 1 to June 20, 1943" (Br. 14), and this Court has perhaps restricted the recovery accordingly (p. 1). But the figure is still very large. The record affords no support for the June 20th terminal. No reason appears why that time was indicated instead of, for instance, May 1, 1943, when the United States first seized the mines (R. 301, 713). Both dates

were within the agreed extension of the applicable wage contract.

It is wholly unfair and inequitable to permit the Union thus to repudiate the extension of its contract from April 1, to June 20, 1943, and to reap a reward for so doing in the circumstances of this case. Petitioner has complied strictly with its contract, while the Union has repudiated it in the most brazen and cynical manner. Yet the effect of the decision is to reward the wrong-doer at the expense of the innocent. Surely it cannot be successfully claimed that the Union is free of moral wrong, that it has not been guilty of sharp practice, that it has not lost its right to make any pecuniary claims.

VIII. Conclusion.

In view of the strong considerations supporting the prayer of this petition and hereinbefore pointed out, we respectfully submit that rehearing ought to be granted.

Respectfully submitted,

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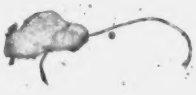

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 721

JEWELL RIDGE COAL CORPORATION,
a Corporation,

Petitioner

vs.

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, etc., et al.,

Respondents.

MEMORANDUM IN OBJECTION TO PETITION FOR REHEARING

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Respondents.

MEMORANDUM IN OBJECTION TO PETITION FOR REHEARING

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition for rehearing is inexcusable in its attack upon Mr. Justice Black. In the first place, if Mr. Justice Black had not sat in the case the Court would have divided evenly and the decision of the Circuit Court of Appeals for the 4th Circuit would have automatically been affirmed.

In the second place, the petition does not set up a single fact which disqualifies Mr. Justice Black. No case is cited in support of any claim of disqualification.

In the third place, every fact which is now mentioned in the petition for rehearing was surely known to counsel long before they argued the case before this Court. If

there were any merit whatsoever in matters they now urge their contention comes too late.

> "It would seem that he should not be permitted to assume the competency of the tribunal to decide for him and its incompetency to decide against him." *Tinkoff* v. *United States*, 86 Fed. 2nd 868 at page 884.

The balance of the petition seems to us not to merit any reply.

Respectfully submitted,

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I hereby certify that I have served a copy of the foregoing memorandum on Messrs. William A. Stuart, Abingdon, Virginia and George Richardson, Jr., Bluefield, W. Virginia by mailing copies to each.

This.....day of....., 1945.

CRAMPTON HARRIS,
Attorney for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 721.—October Term, 1944.

Jewell Ridge Coal Corporation, Petitioner, *vs.* Local No. 6167, United Mine Workers of America, an Unincorporated Association, Affiliated with the International Union, United Mine Workers of America, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[May 7, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

In *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, this Court held that underground travel in iron ore mines constituted work and hence was included in the compensable workweek within the meaning of Section 7(a) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 1063, 29 U. S. C. § 207(a). The sole issue in this case is whether any different result must be reached as regards underground travel in bituminous coal mines.

The petitioner, Jewell Ridge Coal Corporation, owns two bituminous coal mines in Virginia. It instituted this declaratory judgment action against the respondent unions and certain of their officials, representing all of petitioner's underground mine workers. The respondents filed an answer and a counterclaim. By stipulation, the parties sought to determine "what constitutes the working time which makes up the workweek of plaintiff's underground employees within the meaning of Section 7 of the Fair Labor Standards Act of 1938, and what amounts, if any, are due and unpaid to such employees under said Section, the determination of such amounts, if any, to be later referred to a special master." This issue relates only to the work performed by petitioner's underground miners between April 1, 1943, and June 20, 1943.

After hearing evidence and argument, the District Court concluded that petitioner had correctly computed the workweek on

a "face to face" basis and that the Act did not require that the workweek include "either time spent by such employees outside the portal of the mines before entering therein, or time spent in traveling from the portals to their usual places of work and return." 53 F. Supp. 935, 952. Only the issue as to travel time is involved here. The Fourth Circuit Court of Appeals felt that the *Tennessee Coal* case, which was decided by this Court subsequent to the entry of the District Court's judgment in this proceeding, could not be distinguished in principle and accordingly reversed the judgment on that basis. 145 F. 2d 10.

We agree with the court below that there is no substantial factual or legal difference between this and the *Tennessee Coal* case and that underground travel in bituminous coal mines as well as in iron ore mines is included within the compensable workweek contemplated by Section 7(a) of the Fair Labor Standards Act.

Factually, underground travel between the portals and working faces of petitioner's two bituminous coal mines bears all the indicia of work. While the District Court here found "no such painful and burdensome conditions as those described in the iron ore mines," 53 F. Supp. at 949, all three of the essential elements of work as set forth in the *Tennessee Coal* case, 321 U. S. at 598, are present in this instance:

1. *Physical or mental exertion (whether burdensome or not).* After arriving at petitioner's mines by foot or vehicle, the miners first obtain their lamps from the lamp house near the main portal. They then enter the man trips at the portal and are transported down to the underground man trip stations—a journey varying in distance from 4,250 feet to 25,460 feet. Each man trip is composed of a train of small empty coal cars drawn by an electric motor or locomotive. From seven to eight men sit on a bench or on the floor of each car, which is only a few feet high. The cars apparently are not overcrowded. If the roof of the passageway is sufficiently high the men are able to sit upright as they ride. But they must be on constant guard for the frequent low ceilings which force them to bend over to avoid striking their heads. And the dangers of falling slate and falling ceilings are ever present.

The District Court found that while this journey is "definitely not luxurious" it is "neither painful nor unduly uncomfortable, and is less hazardous than other phases of mining operations." In this connection it should be noted that the record shows that six persons suffered compensable injuries, involving absence from

work for seven days or more, while riding on petitioner's man trips from January 1, 1939, to October 31, 1943. There is also evidence of two deaths and numerous minor injuries to the miners.

After arriving at the man trip stations, the miners check in at a nearby check-in board, a practice that differs inconsequentially from the procedure followed by the miners in the *Tennessee Coal* case of checking in at a tally house on the surface. They then collect their tools, equipment, explosives, etc., and carry them on foot to the working places, usually some 500 to 1,500 feet away. This requires that they proceed through dark and dangerous tunnels, often so low as to force them to crouch over while carrying their burdens. Moreover, they must keep constant vigil against live electric wires, falling rocks and obstacles under foot. At the end of each shift, the miners make their return journey to the man trip stations, deposit their tools and equipment and ascend to the portal via the man trips.

In addition, approximately 72 men at petitioner's Jewell Ridge mine enter the mine at places other than the main portal and either catch the man trips at some man trip station inside the mine or walk all the way to their places of work.

These undisputed facts compel the conclusion that the underground travel in petitioner's mines involves physical and mental exertion. That it may not be so burdensome or disagreeable as some of the aspects of the travel described in the *Tennessee Coal* case is not of controlling significance in this respect.

2. *Exertion controlled or required by the employer.* It is obvious that the underground travel is both controlled and required by petitioner. Both the man trip transportation and travel by foot occur solely on petitioner's property and occur only as and when required by petitioner. Petitioner organizes, operates and supervises all aspects of the man trips. Definite schedules are arranged and maintained by petitioner. A company foreman rides on each man trip and occasionally gives work instructions during the journey. He also compels compliance with the numerous safety rules for man trips adopted by petitioner in compliance with state law. Layoff or discharge may result from a miner's continued failure to obey these rules.

3. *Exertion pursued necessarily and primarily for the benefit of the employer and his business.* It is too obvious to require extended discussion that here, as in the *Tennessee Coal* case, the

underground travel is undertaken necessarily and primarily for the benefit of petitioner and its coal mining operations. The miners do not engage in this travel for their own pleasure or convenience. It occurs only because it is a necessary prerequisite to the extraction of coal from the mines, which is the prime purpose of petitioner's business. Without such travel the coal could not be mined.

Thus the three basic elements of work of a type necessarily included within the workweek as contemplated by the Act are plainly evident from these facts. Those who are forced to travel in underground mines in order to earn their livelihood are unlike the ordinary traveler or the ordinary workman on his way to work. They must journey beneath the crust of the earth, far removed from the fresh and open air and from the beneficial rays of the sun. A heavy toll is exacted from those whose lot it is to ride and walk and mine beneath the surface. From the moment they enter the portal until they leave, they are subjected to constant hazards and dangers; they are left begrimed and exhausted by their continuous physical and mental exertion.

To conclude that such subterraneous travel is not work is to ignore reality completely. We therefore are compelled to hold that the only reasonable conclusion to be drawn from the District Court's findings of fact and from other undisputed evidence is that the underground travel in petitioner's two mines is work and that the time spent in such travel should be included within the workweek for purposes of Section 7(a) of the Fair Labor Standards Act.

The other propositions advanced by petitioner are also answered by the principles of the *Tennessee Coal* case. Thus petitioner places heavy reliance upon the conclusion of the District Court that "by the universal custom and usage of the past fifty years, and by agreement of the parties in every collective bargaining agreement which was ever made, it was universally recognized that in the bituminous coal industry, travel time was not work time." 53 F. Supp. at 950. But even though the customs and contracts prevalent in this industry were to compute the workday only from the time spent "face to face" with the seams, we need only repeat what we said on this subject in the *Tennessee Coal* opinion, 321 U. S. at 602: "But in any event it is immaterial that there may have been a prior custom or contract not to con-

sider certain work within the compass of the workweek or not to compensate employees for certain portions of their work. The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him only for a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights."

Such a conclusion is the only method of achieving the plain design of Section 7(a) to spread employment through imposing the overtime pay requirement on the employer and ~~compensating~~ the employee for the burden of a workweek in excess of the hours fixed by the Act. *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 40; *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 577, 578. This necessitates that the workweek be computed on the basis of the hours spent in actual work and that compensation be paid accordingly. And even those employers who pay wages above the minimum and who maintain no substandard working conditions must respect this statutory pattern. Conversely, employees are not to be deprived of the benefits of the Act simply because they are well paid or because they are represented by strong bargaining agents. This may in some instances require certain modifications and adjustments in existing customs and contracts in order to include all the hours actually worked in the statutory workweek or to compensate at the proper rate for all of such labor. But if these modifications and adjustments are not made the plain language and policy of Section 7(a) are frustrated.

Petitioner here has presented no cogent reason for legalizing such a frustration, however unintentional in character, of the statutory scheme. Statements in the legislative history to the effect that the Act was aimed primarily at overworked and underpaid workers and that the Act did not attempt to interfere with bona fide collective bargaining agreements are indecisive of the issue in the present case.[1] Such general remarks, when read fairly and in

[1] Thus, for example, the District Court relied in part upon a statement made by the Senator in charge of the original bill, which did not become law as it was then framed, to the effect that the bill did not affect collective agreements already made or hereafter to be made between employer and

light of their true context, were obviously not made with this narrow issue in mind and they cannot be said to demonstrate a Congressional desire to allow the coal industry to use private customs and agreements as an excuse for failure to compute the workweek as contemplated by Section 7(a). In fact, some of these statements expressly recognized the necessity of modifying or setting aside those collective agreements that did not conform with statutory standards.[2]

Nor can we give weight to the fact that the Administrator of the Wage and Hour Division in 1940 issued a public statement that he would not regard the practice of computing working time on a "face to face" basis in the bituminous coal industry as unreasonable in light of the prevailing customs and practices, supported by a long history of bona fide collective bargaining. This statement, being legally untenable, lacks the usual respect to be accorded the Administrator's rulings, interpretations and opinions. Cf. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140.

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employee. 81 Cong. Rec. 7650. Aside from the fact that this statement was made with reference to entirely different provisions than those presently in the Act, a full and fair reading of the entire debate at the time in question demonstrates that the possibility of affecting or setting aside collective agreements when they did not coincide with statutory standards was definitely understood and appreciated. This is shown by the following remarks (81 Cong. Rec. 7650):

"Mr. Walsh. Next, does the bill affect collective-bargaining agreements already made or hereafter to be made between employers and employees?

"Mr. Black. It does not.

"Mr. Walsh. There is one exception to that, is there not? The bill does not affect collective-bargaining agreements where the hours are less than 40 per week, or where the wages are more than 40 cents per hour?

"Mr. Black. That is correct.

"Mr. Walsh. But if a collective-bargaining agreement had been entered into at 36 cents per hour wages, *the board would have jurisdiction to set that agreement aside* and to fix, if the facts warrant it, a minimum wage of 40 cents? (Italics added.)

"Mr. Black. The board would have jurisdiction to do it, but under the provisions of the law it would be my judgment that the board would be very reluctant, indeed, to attempt to interfere with a bona-fide agreement made between employer and employee.

"Mr. Walsh. I think the Senator is correct; but the situation might well exist that the board, in fixing a minimum wage in a case where the wage of the employees was less than 40 cents, after a survey and study of the question, and taking into consideration some factors that it must take into consideration in fixing the wage, might decide, let us say, upon 38 cents per hour. If it is found that in some other industry of like character and nature there was a collective-bargaining agreement providing for the payment of 36 cents an hour it would, would it not, take jurisdiction and *set aside that collective-bargaining agreement insofar as the facts showed that 38 cents was a fair rate?* (Italics added.)

"Mr. Black. It would."

2 See note 1, *supra*.

Moreover, as in the *Tennessee Coal* case, we are not concerned here with the use of bona fide contracts or customs to settle difficult and doubtful questions as to whether certain activity or non-activity constitutes work. Cf. *Armour & Co.* v. *Wantock*, 323 U. S. 126. Nor do we make any intimations at this time concerning the validity of agreements whereby, in a bona fide attempt to avoid complex difficulties of computation, travel time is averaged or fixed at an arbitrary figure and underground miners are paid on that basis rather than according to their individual travel time.

We are dealing here solely with a set of facts that leaves no reasonable doubt that underground travel in petitioner's two bituminous coal mines partakes of the very essence of work.[3] This travel must therefore be included within the workweek for purposes of Section 7(a) of the Fair Labor Standards Act regardless of any custom or contract to the contrary at the time in question. Thus shall each of petitioner's miners receive his own reward according to his own labor.

Affirmed.

[3] Indeed, to the extent that petitioner's "face to face" collective bargaining agreements excluded travel time from the compensable workweek there was an implied recognition that underground travel was work and that such work would normally call for additional compensation in the absence of a specific "face to face" provision to the contrary. And the wide-spread practice in other coal producing nations of including travel time or portions thereof in the workday further bears out the conclusion that underground travel is work.

SUPREME COURT OF THE UNITED STATES.

No. 721.—October Term, 1944.

Jewell Ridge Coal Corporation, Petitioner, *vs.* Local No. 6167, United Mine Workers of America, an Unincorporated Association, Affiliated with the International Union, United Mine Workers of America, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[May 7, 1945.]

Mr. Justice Jackson, dissenting.

The Chief Justice, Mr. Justice Roberts, Mr. Justice Frankfurter, and I are constrained respectfully to dissent from this decision because (1) It either invalidates collectively bargained agreements which govern the matter in difference between these parties or it ignores their explicit terms; (2) Neither invalidation nor disregard of collectively bargained agreements is authorized by any word of Congress, and legislative history gives convincing indications that Congress did not intend the Fair Labor Standards Act to interfere with them as this decision holds it does; (3) Congress withheld interference with collectively bargained contracts at the request of the United Mine Workers and expressed a policy to observe and preserve collectively bargained arrangements applying to the coal industry in other almost contemporaneous legislation specifically directed to the problems of that industry; (4) This decision is contrary to interpretations of the Act made by the Administrator upon the recommendation of the United Mine Workers, and it denies to the Administrator's rulings the respect we have been compelling lower courts to render to them in the cases of others; (5) The decision necessarily invalidates the basis on which the Government itself has operated the mines and brings into question the validity of the Government's strike settlement agreements and of all existing miners' agreements; (6) It proceeds on a principle which the Court has unanimously denied to unorganized workmen for whose benefit the Act

was passed. It is the purpose of this opinion to set forth particulars supporting these grounds of dissent.

1. *The Court's decision either invalidates or ignores the explicit terms of collectively bargained agreements between these parties based on a half century of custom in the industry.* This action involves labor in two mines, each employing approximately five hundred men. At all times in issue the mines have been unionized and the workmen have been organized by the United Mine Workers of America. This union has been selected and recognized as the bargaining agent of the men. Their hours, wages, and working conditions have been fixed by collective bargaining.

Employees in these mines first were organized as members of the United Mine Workers of America in 1933, following promulgation of the N. I. R. A. Code of Fair Competition for the industry. This code was drawn up by representatives of the Union and of the operators and was approved by the President of the United States. It provided for the "face to face" wage basis which makes no direct allowance for travel time, but, as has been pointed out on behalf of the Union, the wage scale was fixed at a level intended indirectly to compensate travel time. Basic wage agreements thereafter were entered into between the Union and the operators as of April 1, 1934 (continued in effect by successive extension agreements from March 31, 1935 until October 1935); again as of October 1, 1935; and as of April 2, 1937; again as of May 12, 1939, when the Fair Labor Standards Act was nearly a year old and had been in effect for nearly six months, a new agreement was bargained which, like all the previous wage agreements, expressly provided for the "face to face" basis, necessarily excluding all travel time from the work week. The last basic wage agreement reached by collective bargaining previous to the commencement of this action, dated April 1, 1941 and to extend for a period of two years, did the same. These agreements are admitted and, if valid, govern the dispute between the parties.

But the Court does not honor these agreements. We have repeatedly and consistently held that collectively bargained agreements must be honored, even to the extent that employers may not, while they exist, negotiate with an individual employee or a minority, cf. *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, and must pay heavy penalties for violating them. Cf. *Order of Railroad Telegraphers* v. *Railway Express Agency*,

321 U. S. 342. And now at the first demand of employees the Court throws these agreements overboard, even intimating that to observe agreements, bargained long before enactment of the Fair Labor Standards Act would be "legalizing" a frustration of the statutory scheme.

The suggestion that the agreements were "frustrations" of the statutory scheme has not the slightest warrant in this record. This "face to face" basis was traditional in the bituminous coal mining industry in this country and universally was the basis for determination of hours therein for something like half a century. This was contrary to the practice in England and Continental Europe, where the basis has been to calculate time from entry of the mine to leaving it or from "portal to portal" or some modification thereof. The reason American miners accepted this arrangement appears from an official statement by counsel for the United Mine Workers of America to the Administrator of this Act that "The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual working place. Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898," and "This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years and is the result of collective bargaining in its complete sense."[1]

The Court takes refuge in its own decision in *Tennessee Coal & Iron Co.* v. *Muscoda*, 321 U. S. 590, saying "We agree with the court below that there is no substantial factual or legal difference between this" case and that. But in the *Tennessee* case this Court pointed to facts of very different import saying, "Likewise there was substantial, if not conclusive, evidence that prior to 1938 petitioners [operators] recognized no independent labor unions and engaged in no bona fide collective bargaining with an eye toward reaching agreements on the workweek. Contracts with company-dominated unions and discriminatory actions toward the independent unions are poor substitutes for 'contracts fairly arrived at through the process of collective bargaining.' The

[1] See letter of Houck set forth in Note 5.

wage payments and work on a tonnage basis, as well as the contract provisions as to the workweek, were all dictated by petitioners [operators]. The futile efforts by the miners to secure at least partial compensation for their travel time and their dissatisfaction with existing arrangements, moreover, negative the conclusion that there was any real custom as to the workweek and compensation therefor." *Tennessee Coal Co.* v. *Muscoda Local, supra,* 601-2.

The Court does not contradict the Union's recognition that the contracts now disregarded by the Court were "contracts fairly arrived at through the process of collective bargaining." And that there is this important difference between the present situation and the situation that was before us in the *Tennessee* case was recognized by the counsel in the *Tennessee* case, the same counsel who argued this case at our bar. He had no difficulty in finding substantial factual and legal differences when he did not want the above-described situation in the *Tennessee* case to be prejudiced by being likened to this situation. The District Court quoted as "quite interesting" an excerpt from the argument made in the brief in that case: "'We are not trying the case of coal miners. We are not experts on coal mining. We do know that there are two great differences between the coal mining situation and the mining of iron ore in Jefferson County. In coal mining we find a union which has been strong and powerful and which as a union has been engaged in collective bargaining with the coal operators over a long period of years. In our case we find the efforts of the men to organize their union presents a pitiable picture of helplessness against the domination of the mining companies. In coal mining the men work seven hours per day. At no point in the voluminous record created by the appellants do we find a single ore mining company offering to pay its men on a seven hour day.'"[2]

[2] 53 F. Supp. 935, 948. Similarly interesting arguments were presented to this Court in the brief which was submitted here in the *Tennessee* case: "The underground employees are not coal miners. They mine iron ore. We did not try out in the Courts below the claims and counter claims of the United Mine Workers of America and the coal operators. We do not see how we can try the issues between coal miners and coal operators on a record portraying the work, the environment and the detailed conditions in the iron mining industry. The judicial process applies to specific cases between designated parties. . . . The case, therefore, hinges on a matter of simple fact." (Respondents' Brief, pp. 28-29.)

We submit that there are substantial factual differences between these cases, and we therefore come to the question whether the presence in these cases of genuine collectively bargained contracts covering the matter in dispute has any legal significance. The Court thinks they mean nothing. We cannot agree.

2. *Neither invalidation nor disregard of collectively bargained agreements is authorized by the Fair Labor Standards Act. Both its legislative history and contemporaneous legislation are convincing that Congress did not itself intend to nullify them or to provide any legislative basis for this Court to do so.* It is admitted that the Act contains no express authority for this decision. As was said in *Tennessee Coal Co.* v. *Muscoda*: "In determining whether this underground travel constitutes compensable work or employment within the meaning of the Fair Labor Standards Act, we are not guided by any precise statutory definition of work or employment. Section 7(a) [29 U. S. C. § 207] merely provides that no one, who is engaged in commerce or in the production of goods for commerce, shall be employed for a workweek longer than the prescribed hours unless compensation is paid for the excess hours at a rate not less than one and one-half times the regular rate. Section 3(g) [29 U. S. C. § 203(g)] defines the word 'employ' to include 'to suffer or permit to work,' while § 3(j) states that 'production' includes 'any process or occupation necessary to . . . production.'"[3] This is every straw that can be picked from the statute for the Court to grasp at.

Likewise, the Court is unable to cite any item of legislative history which hints that Congress expected these words to be given this meaning. On the other hand, we find that pains were taken to assure Congress that there was no such intent.

The bills which ultimately resulted in this Act were introduced in 1937. As the District Court said "Although . . . statements were made at various times while the measure was being amended and revised, and therefore not with respect to the Bill in its final form, they show a continuing intention not to interfere with the processes of collective bargaining."[4] Examples are multiple. The Senate Committee on Education and Labor in its report of July 6, 1937, said:

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[3] 321 U. S. 590, 597.

[4] 53 F. Supp. 935, 944.

"The right of individual or collective employees to bargain with their employers concerning wages and hours is recognized and encouraged by this bill. It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-working-hour industrial workers, who are helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage." (Senate Report No. 884, 75th Cong., 1st Sess., pp. 3-4.)

The debates on the bill appear to us to make this intention more explicit. For example, the Congressional Record, Vol. 81, p. 7650, shows that the following took place in debate in the Senate July 27, 1937:

"Mr. Walsh. Next, does the bill affect collective bargaining agreements already made or hereafter to be made between employer and employee?

"Mr. Black. It does not."

Of course it was agreed on all hands that no agreement could be validly bargained which provided for less than the minimum wages to be fixed by the proposed Board or for more than the specified hours of labor. But beyond observance of these limitations, we read the legislative history to indicate that the control of wages, hours and working conditions by collective contract was left undisturbed.[5]

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[5] The colloquy follows:

"Mr. Walsh. Next, does the bill affect collective-bargaining agreements already made or hereafter to be made between employers and employees?

"Mr. Black. It does not.

"Mr. Walsh. There is one exception to that, is there not? The bill does not affect collective-bargaining agreements where the hours are less than 40 per week, or where the wages are more than 40 cents per hour?

"Mr. Black. That is correct.

"Mr. Walsh. But if a collective-bargaining agreement has been entered into at 36 cents per hour wages, the board would have jurisdiction to set that agreement aside and to fix, if the facts warrant it, a minimum wage of 40 cents?

"Mr. Black. The board would have jurisdiction to do it, but under the provisions of th law it would be my judgment that the board would be very reluctant, indeed, to attempt to interfere with a bona-fide agreement made between employer and employee.

"Mr. Walsh. I think the Senator is correct; but the situation might well exist that the board, in fixing a minimum wage in a case where the wage of the employee was less than 40 cents, after a survey and study of the question, and taking into consideration some factors that it must take into consideration in fixing the wage, might decide, let us say, upon 38 cents per hour. If it is found that in some other industry of like character and nature there was a collective-bargaining agreement providing for the payment of 36 cents an hour it would, would it not, take jurisdiction and set aside that collective-bargaining agreement insofar as the facts showed that 38 cents was a fair rate?

"Mr. Black. It would." 81 Cong. Rec. 7650.

Definite assurances to that effect repeatedly given to the House[5] are noted in the margin.[6] Nor are these assurances surprising or paradoxical.

3. *Congress refrained from enacting authority for this result at the request of the United Mine Workers, expressed in the testimony of their responsible representatives, whose plan for regulating the coal industry was enacted in the Guffey Coal Act.* In 1937, bills which ultimately resulted in the Fair Labor Standards Act were introduced in both houses of Congress and hearings were held. Major Percy Tetlow, an official of the International Union, United Mine Workers of America, as a witness in this case, summarized the attitude of the mine workers as follows:

"No, the Miners' organization has always taken the position that the question of wages, hours and conditions of employment should be governed and controlled by agreements under collective bargaining in the industry more so than by legislation. We have always taken the position that any legislation which will improve

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[6] The District Court summarized these as follows:

"Mrs. Norton. . . . It is not the intention of this amendment, or of the bill, to start fixing wages in all industries but only in those in which oppressive wages are being paid to a substantial portion of workers . . . ." (House, December 13, 1937, Congressional Record, Vol. 82, p. 1391.)

"Mr. Randolph. . . . It [the bill] is not concerned with that fortunate majority of the laboring classes whose collective bargaining power is sufficiently potent to insure the preservation of their industrial rights.

"But it is concerned with those millions in industry who are unprotected and unorganized. . . ." (House, December 13, 1937, Congressional Record, Vol. 82, p. 1395.)

"Mr. Curley. . . . There is no conflict of jurisdiction under the provisions of this fair standards of labor bill, and the existing labor organizations of this country. The bill concerns only of relieving the paralysis which, at present, shackles misery and poverty to millions of heads of families, who are underpaid and causing a colossal financial loss in purchasing power because of existing deplorable conditions." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7285.)

"Mr. Boileau. . . . What is more, we are preserving for organized labor its right to bargain collectively and it will bargain for a higher wage than that." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7290.)

"Mr. Allen. . . . This bill has a threefold purpose as I see it. First, it eliminates sweat shops— . . . The bill does not affect organized labor, but those 5,000,000 American working men and women who have not yet been benefited by organized labor." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7291.)

"Mr. Fitzgerald. . . . I would have you observe that this proposed legislation will not improve the wages and hours of the majority of workers, nor does it attempt to. For I am greatly pleased to say that the majority of workers do not need this legislation because they are receiving a living wage and are not forced to work unreasonable hours." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7310.)

standards of working men and women,—to favor it and foster it and support it. Fundamentally, we are opposed to legislation that controls the daily wage and conditions of employment. We think that is a relationship that should exist between employer and employee." This is in accord with the testimony of Mr. John L. Lewis, President of the United Mine Workers of America, before the congressional committees, when he said:

"For instance, frankly I would not want this bill to convey power to a board to order an investigation into all of the wage agreements in the mining industry right now, or to give the board power to decide that the collective-bargaining agreements in the mining industry were not sound, not proper, were confiscatory, or not in harmony with the facts of the industry, and order a modification thereof. I think the power of the board should be limited to cases which run below the level of the standards fixed by Congress. I see endless confusion in the adoption of section 5 now. I see a drift toward the complete fixation of wages in all industry by governmental action."[7]

Far from interfering with employer-employee agreements by this Act, the United Mine Workers advocated and Congress enacted contemporaneous specific legislation to confirm them in the coal industry. The same Congress which enacted the Fair Labor Standards Act of 1938 enacted the second Bituminous Coal Act of 1937, (50 Stat. 72, Chap. 127, 15 U. S. C. § 828), which states that

"(a) . . . It is hereby declared to be the public policy of the United States that—

(1) Employees of producers of coal shall have the right to organize and to bargain collectively with respect to their hours of labor, wages, and working conditions through representatives of their own choosing, without restraint, coercion, or interference on the part of the producers." 15 U. S. C. § 839.

It is impossible to believe that Congress in April of 1937 wrote such a specific declaration in favor of collective bargaining and a short time later by general phrases of the Fair Labor Standards Act intended to invalidate or disregard collective bargaining.

It may safely be said that over the past half century Congress has given more detailed and specific consideration to the bitumin-

[7] Joint Hearings before the Committee on Education and Labor, United States Senate and the Committee on Labor, House of Representatives, June 2-22, 1937 (75th Cong., 1st Sess.)-p. 281.

ous coal mining industry than to any other single industry with the possible exception of transportation. The efforts of Congress, the travail of mine labor, and the difficulties of operators are recited in this case and in extensive briefs by the Government and parties interested in the coal mine litigations that have been considered here. Cf. *Appalachian Coals* v. *United States*, 288 U. S. 344; *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Sunshine Anthracite Co.* v. *Adkins*, 310 U. S. 381. In the twenty-three years between 1913 and 1935 when the first Bituminous Coal Conservation Act was passed there were no less than nineteen investigations and hearings by congressional committees or specially created commissions with respect to conditions in this industry which were of grave national concern. These investigations had dealt with bitterly contested strikes, and with serious disorders which frequently resulted in bloodshed and martial law, and which on at least four occasions were restrained by intervention of federal troops. Other investigations were concerned with coal shortages and high prices and with the demoralization of the industry. The plight of this industry at that time was graphically summarized by Mr. Justice Douglas in *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, for an all but unanimous Court: "For a generation there have been various manifestations of incessant demand for Federal intervention in the coal industry. The investigations preceding the 1935 and 1937 Acts are replete with an exposition of the conditions which have beset that industry. Official and private records give eloquent testimony to the statement of Mr. Justice Cardozo in the *Carter* case (p. 330) that free competition had been 'degraded into anarchy' in the bituminous coal industry. Overproduction and savage, competitive warfare wasted the industry. Labor and capital alike were the victims. Financial distress among operators and acute poverty among miners prevailed even during periods of general prosperity. This history of the bituminous coal industry is written in blood as well as in ink.

"It was the judgment of Congress that price-fixing and the elimination of unfair competitive practices were appropriate methods for prevention of the financial ruin, low wages, poor working conditions, strikes, and disruption of the channels of trade which followed in the wake of the demoralized price structures in this industry. If the strategic character of this industry in our economy and the chaotic conditions which have prevailed

in it do not justify legislation, it is difficult to imagine what would."[8]

It was against this economic background so well known to Congress that the plan for stabilization of the bituminous coal industry, through elimination of "competitive warfare" was adopted in the interests both of labor and the operators. In the light of the sustained attention Congress had given to the delicate economy of the coal industry and its plan to stabilize it by collective bargaining and price-fixing, it is unbelievable that it would undo a substantial part of that plan by the casual and ambiguous implication which the Court now attributes to the Fair Labor Standards Act.

4. *The decision of the Court is contrary to the interpretations of the Act made by its Administrator on the recommendation of the United Mine Workers, and it denies to the Administrator's rulings the respect we have been compelling lower courts to render to such administrative rulings in the cases of others.* was not until 1940 that anyone appears to have thought the Act affected the coal miners' agreements. In the year 1940, an investigator of the Wage and Hour Administration, investigating operations of a coal mining company in Pennsylvania, raised the question whether underground travel time must be included in the work week under the terms of the Act. He stated his opinion that the "face to face" basis, excluding travel time, was the proper one to be applied in the coal-mining industry, but indicated that if a rule theretofore applied in the case of a gold mining company were required the coal company would owe some $70,000 to underground workers. This was brought to the attention of the President of the Central Pennsylvania Coal Producers Association, and he in turn brought it to the attention of other operators and of Mr. Lewis, President of the International Union, United Mine Workers of America. Thereafter representatives of both the operators and the United Mine Workers conferred from time to time with the representatives of the Wage and Hour Administration. Both the operators and the Union officials opposed any construction of the Act which would require payment for travel time. On July 9, 1940, representatives of the operators and Mr. Earl Houck, director of the legal department of the United Mine Workers of America, jointly composed and sent to

[8] 310 U. S. 395.

the Administrator of the Wage and Hour Division a letter setting out their views on the subject.[9] They urged that such a change "would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the

[9] The letter appears in the opinion of the district court:

1617 Pennsylvania Boulevard
Philadelphia, Pennsylvania,
July 9, 1940.

Col. Philip B. Fleming, Administrator, Wage and Hour Division,
Department of Labor, Washington, D. C.

DEAR MR. ADMINISTRATOR:

As a result of certain investigations which have been conducted by the Wage & Hour Division at bituminous coal mines in Pennsylvania, particularly at the Revloc shaft of the Monroe Coal Mining Company, and a conference that has been held by your Supervising Inspector, Mr. Caffey, at Pittsburgh, Pa., with a committee of the Western Pennsylvania Coal Operators' Association, concerning the application of the Fair Labor Standards Act to the bituminous coal mining industry, certain questions have arisen that are disturbing to both employers and employees within the industry. These uncertainties have been continuing for some time and are causing much concern to the mine workers and the mine operators, especially with reference to "travel time".

Today, the Negotiating Committee of the Appalachian Wage Conference, namely: Messrs. J. D. A. Morrow, President of Pittsburgh Coal Company; L. T. Putnam of the Raleigh Wyoming Mining Company, Beckley, W. Va.; L. C. Gunter, of the Southern Appalachian Coal Operators' Association, Knoxville, Tenn.; Charles O'Neill, President of the United Eastern Coal Sales Corporation, New York City; C. E. Cowan, Vice President of Monroe Coal Mining Company; Frederick H. Knight, counsel for Monroe Coal Mining Company. W. L. Robison, President of the Youghiogheny & Ohio Coal Company and Chairman of the Appalachian Wage Conference on the one hand, and Mr. Earl E. Houck, Director of the Legal Department of the United Mine Workers of America, met with Mr. Dorsey, Regional Director, Philadelphia, Pa., and Mr. Gallagher, Regional Counsel, Philadelphia, Pa., at which time these questions were discussed at length, particularly the application of the Act as to the question of hours of work in the bituminous coal industry.

The mine workers and the mine operators present presented their views to representatives of the Wage and Hour Division as to the provisions of the Appalachian Wage Agreement covering maximum hours and working time. We have filed with the Division copy of the Appalachian Wage Agreement, and the entire provision as to maximum hours and working time is included therein. The pertinent language, however, is "Seven hours of labor shall constitute a day's work. The seven-hour day means seven hours' work in the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis . . . ." The Appalachian Wage Agreement is the basic agreement for the bituminous mines in the States of Pennsylvania, Ohio, West Virginia, Virginia, Eastern Kentucky, Southeastern Tennessee and Maryland. In this territory there are several thousand rail shipping mines employing from 300,000 to 325,000 men, and some twenty-three operating districts. Each of the districts work out a local wage agreement covering its own territory, subject, however, to the provision that it must include within it all of the provisions of the Appalachian Agreement. The mines in the Appalachian region produce 70% of the total bituminous coal produced in the United States annually. Also, the Appalachian Agreement is used by the United Mine

United States. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered im-

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Workers of America as the basic agreement upon which the district agreements of the remaining 30% of the country is predicated.

The United Mine Workers of America and coal operators of the United States have been negotiating wage agreements for a period of fifty years. The Appalachian Agreement, covering as it does a great number of men and mines, has been worked out over that period of time and covers within its general provisions myriad wage rates, conditions of work, and hours of employment. This agreement, with its twenty-three supplemental agreements, constitutes a whole document. In those conferences, of course, hours of work has been one of the principal matters of consideration during this period of time. Hours of work with wage rates constitute the heart of any such agreement. In this basic industry we have provided for seven-hour days, five-day weeks, thirty-five hours per week, with high rates of pay. The basic inside day rate in the North is $.857 per hour, and in the South it is $ .80 per hour. The underground workers are paid on this basis with maximum rates for mobile loading machine operators, approximately $1.09 per hour. In addition, the agreement provides, "work by mine workers paid by hour or day in excess of seven hours in one day, or thirty-five hours in any one week, shall be paid for it at the rate of time and one-half . . . ." It is our opinion that these substantive provisions of the agreement are among the highest standards of labor provided in any industry in the United States, both as to hours of working time and as to wages paid. There is full and complete understanding in the industry between employer and employees as to the application of these provisions. This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years and is the result of collective bargaining in its complete sense.

There are many reasons why the provision as to working time has been set out as provided by this agreement. The impracticability of measuring time by any other method is inherent in the very nature of mining coal. Coal mines are sometimes very extensive. When they are first opened up, the working places are, of course, close by and near to the opening of the mine. In such cases there is no problem of either transportation of the men, to the working places or time consumed in reaching them; but as mines grow older, the working places move farther and farther away from the portal or opening of the mine, and as such conditions develop, it becomes necessary for provision to be made for transportation of the men over long distances to their working places. This is usually provided by what is known in the industry as "man trips." These trips are scheduled to leave the outside or opening of the mine at a certain hour, so that all the employees will reach their working places by the hour at which work regularly begins at the working places throughout the mine, and these trips are also scheduled to leave the inside of the mine when the day's work is done, at the conclusion of the seven-hour period of work at the working places. Among other provisions of the agreement, there is provided a time for starting the day's work and a lunch period, as well as a time for expiration of the work day. There is some variation in this, depending upon local conditions as to the starting and quitting time at the various collieries. The agreement provides for a certain tolerance. In any event, the starting and quitting time are no more than seven hours apart, exclusive of the lunch period.

In the many conferences that have been held over this period of fifty years, naturally all manner of suggestions and proposals for amplification or amendment of the agreement has been made both by the mine workers and the operators.

possible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated." In response to the joint representations and recommendation of both operators and the United Mine Workers the Administrator, July 18, 1940, ruled that "working time on a face to face basis in the bituminous

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The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual working place. Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898.

It is urged that any ruling requiring such a change in the custom, tradition and contract provision so as to change the work day from "seven hours' work in the mines at the usual working places" to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated. In such an event, it would make necessary the reassembling of the Appalachian Joint Wage Conference and it would be faced with an issue that would be almost impossible of solution by agreement, resulting in an industrial conflict that could paralyze the nation. This would be a most unhappy result to flow from an act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and the high rates of pay in the bituminous coal mines. The great amount of money involved in the case of extra payment by the operators or the great changes that would be required in the rates of pay to the miners, should any change in the present contract be necessary by reason of a new standard for the measurement of time worked, is so serious that a negotiated adjustment would seem to be impossible.

For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, and the definition of working time, as set forth in the Appalachian Agreement (which embodies the custom and traditions of the bituminous mining industry), as complying both with the provisions of the Fair Labor Standards Act and of Interpretive Bulletin No. 13, to the effect that "reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act."

We therefore respectfully request that your Division issue a supplement to interpretive Bulletin No. 13, stating that the standard of wages and hours of work, and definition of working time, set forth in the Appalachian Agreement, entered into on May 12, 1940, between twenty-three district associations of bituminous coal operators comprising the Appalachian coal producing area and the International Union, United Mine Workers of America, and the several district agreements based thereon, conform to and satisfy the requirements of the Wage & Hour Act.

Respectfully submitted, For the United Mine Workers of America: (S.) Earl E. Houck, Director of the Legal Department. For the Operators: (S.) W. L. Robison, Chairman; (S.) Charles O'Neill, (S.) L. T. Putnam, (S.) J. C. Gunter, (S.) J. D. A. Morrow, Appalachian Joint Conference Negotiating Committee.

coal industry would not be unreasonable."[10] We have admonished lower courts that they must give heed to these interpretations. *Armour* v. *Wantock*, 323 U. S. 126; *Skidmore* v. *Swift*, 323 U. S. 134. The District Court in this case did so, only to find them brushed aside here as of no importance.

5. ***This decision necessarily invalidates the basis on which the Government in operating the mines contracted with the miners and brings into question the validity of all the existing mine agreements.*** It appears to have been wartime restrictions on flat wage increases which finally led the United Mine Workers to reverse their former and to take their present position. It was not until the wage conference of 1943 that the United Mine Workers for the first time demanded that "To conform with the basic and legal requirement for the industry, the maximum hours and working time provision be amended to establish portal to portal for starting and quitting time for all underground workers."[11] But this condition was to be satisfied by a flat wage increase for all mine workers, whether or not they spent any time traveling underground and was not to be based on each individual worker's actual travel time, as the Court now holds the Act requires. The evolution of the Union's present demands is traceable through the sequence of events.

This March 1943 Wage Conference fell into dispute. The case was certified on April 22, 1943 to the National War Labor Board. The parties agreed after request by President Roosevelt to extend the 1941 agreement to May 1. The National War Labor Board on April 24, 1943 directed them, pending decision, to continue work under the previous terms. When May 1st came around, however, the miners went on strike, the Government seized the mines, and the strike came to an end May 6, under a temporary arrangement extending the old contract to May 31. On May 14, the Board directed the Wage Conference to resume negotiations. This reconvened and negotiations continued until June 20. However, when the extension agreement expired on May 31, a second strike began. On June 3, President Roosevelt appealed to the miners to return to work, and they did so after the President of the Mine Workers ordered them to resume until June 20. On that day there was a third strike, which lasted three days, when

[10] 3 Wage and Hour Rep. 332, 333.
[11] 58 F. Supp. 941.

it was terminated on appeal by President Roosevelt, the Union again directing the miners to resume work until October 31. The conferences did not agree and the controversy went again to the National War Labor Board.

The Board found as follows: "The Mine Workers' demand of $2.00 a day was . . . based upon an assumption or estimate that the travel time amount [sic] on the average to an hour and one-half a day. . . . The United Mine Workers proposed to spread this amount over all the workers including those who did not go underground, and so arrived at the proposed general wage increase of $2.00 for all mine workers. . . . It is obvious that these figures are out of all proportion to any amount that could possibly be due to the mine workers under the Fair Labor Standards Act, even if the courts should decide all questions in controversy in favor of the mine workers. The demand is plainly and unmistakably a demand for an 'indirect wage increase in violation of the wage stabilization policies,' contrary to the Board's directive order of May 25, 1943."[12] And in a release on June 18, 1943, the Board said: " . . . The United Mine Workers have not proposed to change the 'face to face' basis of payment. On the contrary they have proposed merely to increase the hourly rate under the present contract system. . . . It would not be in fact payment to the mine workers for portal to portal. It is merely a general wage increase supported by the argument that the mine workers . . . think they ought to have a general wage increase because on the average they will spend a certain amount of time in travel."

Finding itself thus frustrated in its demand for a flat wage increase, the Union then negotiated with the Illinois Coal Operators' Association an agreement which provided for a $1.25 increase for each working day. The National War Labor Board refused to approve this as also violative of the national wage stabilization program. It was then, and apparently because it afforded the only means of obtaining an increase that did not conflict with the wage stabilization program, that the Mine Workers negotiated the second Illinois Agreement, dated September 23, 1943, of which the National War Labor Board said: "The Illinois Agreement now submitted to the Board presents for the first time a true portal-to-portal method of compensation for the mine workers. The 1941-1943 contract provides for a seven-hour day and 35-

[12] 9 War Lab. Rep. 118.

hour week of productive time at the working face, excluding travel time. . . . The Illinois Agreement proposes to substitute for this method of compensation an 8½-hour day inclusive of travel time, with payment at straight time rates for the 8½ hours and overtime payment at rate and one-half for all time beyond 40 hours a week."[13] The Board found that the effect of this was an increase which it could not wholly approve.

Meantime the Government had taken over the mines and on November 3, 1943, the Ickes-Lewis agreement was made. The method of wage calculation under the Ickes-Lewis Agreement was to treat each employee as having forty-five minutes of travel time, irrespective of his actual travel time. The War Labor Board on November 5, 1943 approved the Ickes-Lewis Agreement, and thus in effect granted a flat wage increase, uniform for all miners irrespective of their individual actual travel time.

The testimony in this case closed on November 24, 1943 with the mines still in the hands of the Government. The Government's policy, however, was not to return the mines until an operating agreement could be reached and approved by the miners and the operators. The operators by collective bargaining reached agreements which followed the provisions of the Ickes-Lewis agreement, the mines were returned, and this uniform method continues in use as a result of collective bargaining.

It is important to observe that, while there has thus been introduced a change in the method of computing working time, it by no means complies with and did not purport to be adopted because of the requirements of the Fair Labor Standards Act as now interpreted by this Court. If it is illegal for the operators and the miners by collective bargaining to agree that there shall be no travel time, it is obviously equally illegal to agree that the travel time shall be fixed at an arbitrary figure which does not conform to the facts. That the assumption of forty-five minutes of travel is an unfounded one is evident from the record in this case, which indicates that the average daily travel time in one of the petitioner's mines is eighty-eight minutes; and in the other, 67.1 minutes. If United Mine Workers' agreements are ineffective to make all of this time non-working time, how can they be effective to make half of it non-working time? Moreover, the averaging means that a part of the travel time earned by one miner is taken away from him and given to another who has earned less than

[13] 11 War Lab. Rep. 687.

the average, a procedure utterly unwarranted in the statute, if the statute applies at all. If the Fair Labor Standards Act entitles each individual miner to travel time, not according to the terms of his collectively bargained agreements, but according to the time actually spent, as the Court how holds, these Government agreements violated that law, the present agreements do also, and heavy liabilities both for overtime and penalties are daily being incurred by the entire industry.

6. *This decision proceeds on a principle denied to unorganized workmen for whose benefit the Act was passed.* The ink is hardly dry on this Court's pronouncement, in which all of the majority in this case joined, that: "The legislative debates indicate that the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Savings Bank* v. *O'Neil*, decided April 9, 1945, Note 18, p. 7. That coat ill fits the United Mine Workers. But let us contrast the advantage which this decision extends to a powerful group so plainly outside of the policy of the Act with the treatment of groups that, being unprotected and unorganized, were clearly within it.

Little more than six months ago this Court unanimously remanded to the lower courts for trial and findings on the facts a case involving night waiting time of seven unorganized firemen. It said that "We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. . . . This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. . . . The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 136-37. That was in keeping with other holdings. Cf. *Armour & Co.* v. *Wantock*, 323 U. S. 126, 132-3.

Now comes this case involving the organized miners, and the Court holds that "... we are not concerned here with the use of bona fide contracts or customs to settle difficult and doubtful questions as to whether certain activity or nonactivity constitutes work." It is held in this case that the time must be counted "regardless of any custom or contract to the contrary at the time in question." Can it be that this sudden refusal to weigh the facts is because as found by the District Court on almost undisputed evidence they are so decisively against the conclusion the Court is reaching? *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers*, 53 F. Supp. 935. This was made plain also by the Circuit Court of Appeals, which said:

"In view of the long established custom in the coal industry not to include travel time in the work week, the collective bargaining contracts extending over a long period recognizing the 'face to face' basis of pay; the testimony before the committees of Congress, the reason and purpose of the Fair Labor Standards Act ... and the probable effects and consequences of construing the act to require travel time in bituminous coal mines to be included in the work week, there is strong reason for thinking, as everyone connected with the matter seems to have thought until recently, that it was not the intent of Congress that the act should be so construed in its application to the coal mining industry. The reasons in support of this conclusion are fully and ably set forth in the opinion of the learned judge below and need not be repeated. They would be convincing, were it not for the decision of the Supreme Court in Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, etc., 321 U. S. 590, 64 S. Ct. 698, 703, which we do not think can be distinguished in principle from the case at bar." And it added, "Under the circumstances, there is nothing for us to do but reverse the decision below. If it is thought that the decision of the Supreme Court should be overruled or limited so as not to apply to a case of this character, that is a matter for the Supreme Court and not for us." *Local No. 6167, United Mine Workers* v. *Jewell Ridge Coal Corp.*, 145 F. 2d 10, 11, 13.

The Court now says *Tennessee Coal Co.* v. *Muscoda* is a precedent which controls this case and "that there is no substantial factual or legal difference between this and the *Tennessee Coal* case." That can be said only because the Court declines to look at the record of factual differences, casts them out as being im-

material. The fact is that the *Tennessee* case differed from this as night does from day. Two courts below had decided the vital facts in that case in the miners' favor. One court below has found the facts in this case against them, and the other agrees that its findings are convincing. The Court now declines to appraise the factual difference of this case and holds that this case was decided, although not before us, by the *Tennessee* case opinion, regardless of any variation of facts. This, too, although we have unanimously replied to one litigant who sought the benefit of statements therein that "The context of the language cited from the *Tennessee Coal* case should be sufficient to indicate that the quoted phrases were not intended as a limitation on the Act, and have no necessary application to other states of facts." *Armour & Co.* v. *Wantock*, 323 U. S. 126, 133. We ought not to play fast and loose with the basic implications of this Act.

The "face to face" method, whatever its other defects, is a method by which both operators and miners have tried to bring about uniformity of labor costs in the different unionized mines and to remove the operator's resistance to improved wage scales based on fear of competition. Under this decision there can be no uniform wage in this industry except by disregarding the very duty which this decision creates to pay each miner for his actual travel time. Thus, two men working shoulder to shoulder, but entering the mine at different portals must receive either different amounts of pay in their envelopes or must stay at their productive work a different length of time. Thus, too, old mines which have burrowed far from their portals must shoulder greatly increased labor cost per ton. The differential may be sufficient to make successful operation of some of the older mines impossible. Mining labor has tended to locate its dwellings near its work, and the closing of mines results in corresponding dislocations of mining labor. These are the considerations, so fully set forth in the Houck letter to the Administrator, which the Court is disregarding.

We can not shut our eyes to the consequence of this decision which is to impair for all organized labor the credit of collective bargaining, the only means left by which there could be a reliable settlement of marginal questions concerning hours of work or compensation. We have just held that the individual workman is deprived of power to settle such questions. *Brooklyn Savings Bank* v. *O'Neil*; *Dize* v. *Maddrix*, April 9, 1945. Now we hold collective bargaining incompetent to do so. It is hard to see how the long-

range interests of labor itself are advanced by a holding that there is no mode by which it may bind itself to any specified future conduct, however fairly bargained. A genuinely collectively bargained agreement as to wages, hours or working conditions is not invalidated or superseded by this Act and both employer and employee should be able to make and rely upon them, and the courts in deciding such cases should honor them.

We doubt if one can find in the long line of criticized cases one in which the Court has made a more extreme exertion of power or one so little supported or explained by either the statute or the record in the case. Power should answer to reason none the less because its fiat is beyond appeal.

SUPREME COURT OF THE UNITED STATES.

No. 721.—October Term, 1944.

Jewell Ridge Coal Corporation, a Corporation, Petitioner,
vs.
Local No. 6167, United Mine Workers of America, etc., et al.
} On Petition for Rehearing.

[June 18, 1945.]

By Mr. Justice Jackson.

Since announcement of a mere denial of this petition for rehearing might be interpreted to rest upon any one of several grounds, I consider it appropriate to disclose the limited grounds on which I concur.

The unusual feature of the petition in this case is that it suggests to the Court a question as to the qualification of one of the Justices to take part in the decision of the cause. This petition is addressed to all of the Court and must either be granted or denied in the name of the Court and on the responsibility of all of the Justices. In my opinion the complaint is one which cannot properly be addressed to the Court as a whole and for that reason I concur in denying it.

No statute prescribes grounds upon which a Justice of this Court may be disqualified in any case. The Court itself has never undertaken by rule of Court or decision to formulate any uniform practice on the subject. Because of this lack of authoritative standards it appears always to have been considered the responsibility of each Justice to determine for himself the propriety of withdrawing in any particular circumstances. Practice of the Justices over the years has not been uniform, and the diversity of attitudes to the question doubtless leads to some confusion as to what the bar may expect and as to whether the action in any case is a matter of individual or collective responsibility.

There is no authority known to me under which a majority of this Court has power under any circumstances to exclude one of its duly commissioned Justices from sitting or voting in any case.

As to the other and usual grounds, applications for rehearing in this Court, as in other bodies, are addressed to the majority which promulgated the decision. This is so formulated by our Rule 33. It is always obvious that unless one or more of them is willing to reconsider his position no good can come of reargument. Hence, being in dissent, I have no voice as to rehearing, except that I continue to adhere to the dissent.

Because of these considerations I concur in denial of the petition.

Mr. Justice FRANKFURTER concurs in this statement.